

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA
For the Period
April 1, 1946
Through June 30, 1946
Volume 43

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from April 1, 1946, through June 30, 1946.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

WILLIAM N. McQUEEN,
Attorney General.

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OPINIONS

April 2, 1946.

Hon. Charles W. Terry, Director,
State Personnel Department,
Montgomery, Alabama.

State Personnel Department—Unclassified Service—Employment
and Pay Plan—Code 1940, Title 55, Sections 301, 303, 304, construed—

Employees in the unclassified service should be designated by the appointing authority to a position, the duties and pay of which shall be controlled by provisions of law generally known as "The Merit System Act."

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion, bearing date of March 14, 1946, is as follows:

"I wish to direct your attention to that part of Article 301, Chapter 9, Title 55, of the Code of Alabama that deals with employees in the unclassified service. It provides in part, 'Employees in the unclassified service shall be subject to the same rules and regulations of employment as apply to employees in the classified service except as to appointment and dismissal.' It is provided in Article 303 that all positions in the state service be classified and designated by a class title. It is provided in Article 304 that pay ranges be provided, and that all employees must be paid at one of the rates set forth in the pay plan.

"The Personnel Board in their rules have established procedures for administering provisions of the law relative to classifications and pay.

"I shall appreciate having your opinion on the following questions:

"1. Should employees in the unclassified service be appointed by the appointing authorities to one of the established classifications?

"2. If so, must their salary fall within the range provided in the pay plan?

"3. If not, what law governs their salary, and what authority is necessary to effect a legal change in their rate of pay?"

In reply I wish to advise that in my opinion your first two questions must be answered affirmatively. Section 301 of Title 55 of the Code of 1940, provides, in part, as follows:

"Employees in the unclassified service shall be subject to the same rules and regulations of employment as apply to employees in the classified service, except as to appointment and dismissal."

The legislative intent here expressed seems clear that all employees of the state of Alabama in the unclassified service must be paid in accordance with the general plan set up by the provisions of law generally known as "The Merit System Act" and quoted above, in part.

Section 303 of Title 55 of the Code of 1940 sets out the general scheme and basis for determination of classification of duties. This classification is necessary for the proper determination of a just scale of compensation. The pay plan is set out in the next succeeding section of the same system of law as Section 304, and provides, in part, that "each employee in the state service shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed." When this entire system of law governing a single subject is construed as a whole it becomes clear that the proviso set out in Section 301, supra, controlling the employment and pay of persons in the classified service shall be applicable to the employees in the unclassified service, except in so far as it pertains to appointment and dismissal.

Premises considered it is my opinion that employees in the unclassified service should be designated by the appointing authorities to a position, the duties of which are defined by one of the established classifications, and, secondly, that their salaries should fall within the range provided for in the pay plan designated by Section 304 of Title 55 of the Code of 1940, as "one of the rates set forth in the pay plan for the class of position in which he is employed."

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

April 2, 1946.

Hon. J. Z. Jordan,
Member Appointing Board,
Choctaw County,
Butler, Alabama.

Elections—Section 349, Title 17, Code of 1940—

In a primary election, if the county executive committee of the party submits a list of names to the appointing board for appointment as election officials, the appointing board shall select the legally eligible persons for election officials from the list so presented to it and if the number of legally eligible persons on said list is insufficient, the appointing board shall supply the deficiency from electors of that party.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, dated March 26, 1946, is as follows:

"Please advise whether the Appointing Board, under the provision of Section 349, Title 17, Code of 1940, has discretionary power to appoint someone other than a person certified to them as an election official by the county committee.

"For example, if the county committee certifies to the Appointing Board six persons for a given district, ward, or precinct in the county, and all six persons are qualified and eligible to serve as election officials, is it mandatory for the board to appoint all six of these persons so certified to serve as election officials in that given district, ward, or precinct?"

The appointment of election officers is governed by Section 349, Title 17, Code of 1940, quoted in part below:

"Election officers named; oath of.—Each candidate for nomination may at least twenty-five days before the primary, present to the county executive committee of his party a list of election officers desired by him for any one or more of the districts, wards, or precincts; and his county committee shall, so far as practicable, make up, from the list so presented to it, a list of names of election officers, six in number, for each district, ward, or precinct, which it will nominate to the appointing board of the county for appointment as officers to conduct the primary election and the county committee shall present the list so made up by it to the appointing board of the county, which appoints the election officers to conduct elections for state and county officers in November, or at any other lawful time, which appointing board from the list so presented to it by the county committee shall if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct

the primary election; observing the above rule as to representation wherever more than one party enters the primary and in the latter case if a county committee has not given a sufficient number of names for a box, then the appointing board shall supply the deficiency from electors of that party. *** "

Thus, it may be seen from the quoted portion of this section of the code that when the county executive committee of the party submits to the appointing board a list of names of election officers for the primary election, the appointing board **"from the list so presented to it by the county committee shall, if there be on said list the names of sufficient persons who are legally eligible, select and appoint the officers to conduct the primary election."** (Quarterly Report, Attorney General, Vol. 18, p. 177).

It is my opinion that if the list of election officers submitted to the appointing board by the county executive committee of the party contains the names of sufficient persons who are legally eligible, then the appointing board **must** select and appoint the officers to conduct the primary election **from such list**. It appears that the only discretionary power of the board to appoint is where "a county committee has not given a sufficient number of names for a box, then the appointing board shall supply the deficiency from electors of that party." However, this situation can arise, in my opinion, only after the list of legally eligible persons presented to the appointing board by the county committee has been exhausted and more election officials are required.

Therefore, my answer to your first question is that the appointing board **must** select the legally eligible persons for election officials from the list presented to it by the county committee. If the number of legally eligible persons on this list is insufficient, then the appointing board shall supply the deficiency from legally qualified electors of that party.

My answer to your second question is that if the county committee certifies to the appointing board the names of six persons for a given district, ward, or precinct, in the county and all six persons are qualified and eligible to serve as election officials and six persons are required as officials in the given district, ward, or precinct, the appointing board must appoint all six persons so listed to serve as election officials. The board cannot disregard the name of any one of these six persons, properly nominated and qualified, and appoint another person that has not been nominated to the appointing board by the county committee. If any of these six persons are not legally eligible for appointment as election officials, the appointing board shall supply the deficiency as provided above.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

April 2, 1946.

Hon. G. R. Swift, Director,
State Highway Department,
Montgomery 4, Alabama.

Acts 1943, p. 311—Farm to Market Roads—Costs of Construction—

Under Acts 1943, p. 311 (Farm to Market Road Act of 1943), the value or cost of hauling materials borne by a county for construction of a road under said Act and to be agreed upon by the State Highway Department and the county is a proper credit to the county upon an accounting to determine the total cost of construction.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, dated March 16, 1946, is as follows:

"Re: Farm to Market Road Act of 1943.

"After informal discussion with your office relative to contracts between the State Highway Department and the several counties of the state for the construction of Farm to Market Roads, as authorized by the Act referenced above, the following action was taken:

"In Chambers County, which has two active contracts for construction with county forces and equipment, a supplemental agreement was entered into at the request of the county, whereby the county is credited with a unit price of .50 (fifty cents) per cubic yard one mile haul for base course of roadbed topping material, hauled and delivered to the project, dumped, mixed and processed in place to the point of application of tar prime. For each additional half mile unit hauled, a unit price of .04 (four cents) per cubic yard is allowed.

"The question has been raised several times as to whether this procedure is within the intent of the law. The prices named are well within the average contract prices for similar work under similar conditions, and it is not believed any material profit will accrue to the county as a result. The agreement was entered into at the request of the county to simplify accounting, in view of the fact they are hiring trucks to haul at these same figures.

"An opinion from your office as to the soundness of the procedure noted above, will be appreciated."

Under Section 5 of the Act in question (General Acts 1943, p. 311), the cost of construction includes "the value or cost of all labor and materials furnished whether by the state, the highway department, or by the county." Obviously the cost of hauling materials used for constructing a road is a part of the cost of construction.

I see no reason therefore why such cost, if borne by the county, may not be credited to the county in computing the cost of construction. Whether the credit so allowed the county is reasonable is a question of fact to be determined by the department and the county.

In the accounting between the department and the county the cost or value of the county's contribution by way of hauling materials for construction of the road may therefore, in my opinion, be properly allowed as a credit to the county.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

April 3, 1946.

Hon. Charles W. Terry, Director,
State Personnel Department,
Montgomery, Alabama.

Title 55, Section 316 (3), Code of 1940, Pocket Supplement.

1. Under Title 55, Section 316 (3), it is not mandatory that each returning veteran state employee file a written request with the personnel board for reinstatement and undergo a mental and physical examination before reinstatement.

2. A veteran state employee must obtain approval of the personnel board or its duly authorized approving agent before reinstatement is in conformity with Title 55, Section 316 (3), Code of 1940.

3. Veteran state employees should be reinstated whenever practicable in the exact former position held, but have no rights of enforcement under Title 55, Section 316 (3), (a) upon assignment to different duties, unless a material change from former duties has occurred, and (b) to assignment to a particular location, unless specifically provided for in the contract of employment.

4. Veteran state employees under Title 55, Section 316 (3), have the right at any time before expiration of twelve months after termination of honorable service in which to file application for their former state position.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of March 14, 1946, is as follows:

"Your attention is directed to Article 316, (1) (2) (3) (4), Chapter 9, Title 55 of the Code of Alabama (Pocket Supplement) that deals with reinstatement of state employees who have been called into active service of the armed forces of the United States. Several questions involving the application of this law have recently been called to the attention of this department. At your earliest convenience I would like to have your opinion on the following questions:

"1. Is it mandatory that each returning veteran employee shall file a written request with the Personnel Board for reinstatement, and that his mental and physical condition be examined before he may be reinstated?

"2. If a veteran employee applies for reinstatement to his appointing authority, who in turn obtains the approval of the Personnel Director, and the employee returns to work, is his reinstatement in conformity with the law?

"3. If an appointing authority reinstates a veteran to the same class of position at the same salary that he had before he went on military leave, but assigns him to duties that differ from those he previously performed, or assigns him to similar duties in a different locality, has the veteran been properly reinstated under the provisions of the law?

"4. If a veteran employee is reinstated under conditions outlined above (Par. 3), then resigns because he objects to his duty assignments, may he claim reinstatement rights under this law within a twelve month period from the date of honorable discharge from the service on the grounds that he had never been reinstated to the position in the state service he held prior to his military leave?"

In discussing the questions you propose, it is deemed appropriate to first review pertinent legislation on point.

Title 55, Section 316 (1), Sub-pocket Part of our 1940 Code, provides in effect that no state employee called into the active military service loses his classified status by reason of such service. Title 55, Section 316 (2), makes provision for the granting of leaves of absences to state employees entering military service.

Title 55, Section 316 (3), relates to restoration to former position after military service, and is quoted as follows:

"Section 316 (3). Restoration to former position after service in armed forces.—At any time before the expiration of twelve months after the termination of the period of honorable service of such applicant in any of the armed forces of the United States, he may apply in writing, which application shall be directed to and filed with the state director of personnel, for the termination of his leave of absence. Within thirty days of the filing of such application, the state personnel board shall consider the same, and, if the mental and physical condition of the applicant are such that he is not thereby disqualified to perform the duties of such position from which he had leave of absence, it shall thereupon order his

restoration to said position, effective upon the date on which the said order is made and entered. Such restoration shall be made, as herein provided, notwithstanding the fact that it results in the lay-off of the incumbent who is serving in such position."

The answers to all of your questions appear to depend upon an interpretation of legislative intent incorporated in Section 316 (3) above. This "war time" legislation was obviously intended by our legislature to be of the utmost benefit to our returning state employees who had served in the armed forces. Consequently, it is my conclusion that any interpretation of this statute should be liberally construed in favor of such veterans. It is on this basis that your questions are answered.

In question (1), it is my opinion that no written request is mandatory, and that the phraseology "he may apply in writing" merely affords a means whereby a veteran may get his application initially before the personnel director and board without the necessity of personal appearance. The apparent intent of the legislature, in my opinion, was to allow any channels, by personal appearance or by written request, through which the veteran's desire to be restored to his former position could be formally conveyed to the director and board. Putting the board formally on notice, in my opinion, was the prime intent of the legislature and not the method by which this was done. Relative to requirements of the mental and physical examination, it again is my opinion that such an examination is not mandatory before a veteran may be restored to his former position. While questionable cases might necessitate such a procedure in order to conclusively determine whether or not a returning veteran was "disqualified to perform the duties of such position from which he had leave of absence," it appears that the intent here is to allow the personnel board discretionary authority as to when such procedure should be undertaken. In the ordinary case, it would appear sufficient that the personnel board should only be reasonably satisfied from prima facie evidence that the "mental and physical condition of the applicant are such that he is not thereby disqualified," and in the majority of instances an actual physical and mental examination would not be required.

The hypothetical question is raised in your question (2) as to reinstatement being in conformity with law, when a veteran employee applies for reinstatement to his appointing authority, who in turn obtains the approval of the personnel **director** and then returns to work.

Attention is here called to the fact that the statute places approval in the hands of the personnel board and not the director. The following wording of the statute is called to your attention:

"Within thirty days of the filing of the application, the state personnel board shall consider the same, and, if the mental and physical condition of the applicant are such that he is not thereby disqualified to perform the duties of such position from which he had leave of absence, it shall thereupon order his restoration to said position ***."

However, the personnel board, in my opinion, was intended to have discretionary powers broad enough in scope to allow it to achieve prompt and efficient handling of cases—so far as approval is concerned—by such pro-

cedures as appears to be best adaptable. On this premise, it has the right to properly delegate approving authority to such individual or individuals as would be necessary in order to attain the maximum of expedient handling of cases on file.

Therefore, it is my opinion that in the case you outline here the requisites of proper conformity of the law would be met if the director were cloaked with approving authority by the board. If such approving authority has not been conferred upon the director by the board, it appears that conformity of the law has not been met.

On other points of your hypothetical question, it would appear that the basic intent of the legislature has been fulfilled, and the fact that application was forwarded through the appointing authority would not, in itself, disqualify the application—for the reasons stated in answer to question (1) above.

In question (3) you present two situations involving proper reinstatement under provisions of the law.

The first situation is that of a veteran being reinstated to the same **class of position** at the same salary, but **with assignment of duties differing** from those he previously performed. It is my opinion that no fixed rules of interpretation can here be applied to cover all such cases, and that the facts of each case must be studied on their own individual merits for proper determination. Obviously, appointment to the same class of position and at the same salary—insofar as such factors extend—is in proper conformity with the provisions of law. However, assignment to duties different from those previously performed calls for a factual determination of what would or would not constitute different duties from those included within the scope of the veteran's former position. My conclusion on the matter of legislative intent would be that only a "material" change of duties from the scope of the veteran's former position would be contrary to the contemplation of the legislature in this regard. What would or would not constitute a "material" change would obviously depend on the facts of each given case considered along with the scope of his former employment in determining whether or not the law is properly being complied with. The over-all intent of the legislature, as evidenced throughout all legislation on the subject, is to restore the veteran as nearly as possible to the exact position he had before leaving for military service.

However, from a practical standpoint, restoration cannot be made to the final letter in every instance.

By way of example, a state department may have completely finished a particular phase of state work upon which the veteran formerly worked, and he would, of necessity, have to enter upon other work called for by the department. It would appear that as long as there were no "material" changes of assignment of over-all duties from those within the scope of the veteran's former position, the provisions of the statute are being complied with.

Your attention is specifically called, however, to the opinion expressed above that the evidenced intent of the legislature is to restore the veteran as nearly as possible to the exact position he had before leaving for military service, and your attention is further specifically called to that portion of the statute reading as follows:

"Such restoration shall be made, as herein provided, notwithstanding the fact that it results in the lay-off of the incumbent who is serving in such position."

The second situation in question (3) is that of a veteran assigned to similar duties in a different locality. State contracts of employment, generally speaking, contain no provisions therein or fixed rights arising therefrom which give state employees the choice of location of work, and unless such location is specifically provided for in a contract of employment, it is my opinion that no demands can be made in this regard. The interests of the state are wide-spread, and state employees must be located where exigencies demand. While the proposition is reiterated that a returned veteran should be given his exact former position as often as possible and to such extent as is practical even if resulting in the lay-off of the incumbent, I know of no vested right that a state employee has wherein he may demand the place of performance of his employment. On the above basis, assignment of similar duties, although in a different locality would, in my opinion, be in compliance with the statute.

In answer to your question (4), it is my opinion that a veteran employee has the right to present his claim for reinstatement at any time before expiration of twelve months after the termination of honorable service. The fact that he returned and then resigned, in my opinion, does not alter his right under the statute to present the claim that he was not, in fact, reinstated to his former position as the statute calls for. After presentation of claim, the determination of whether or not compliance with the statute has been met should, in my opinion, be controlled by the conditions outlined in my answer to question (3), supra.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

April 9, 1946.

Hon. Chauncey Sparks,
Governor of Alabama,
The Capitol.

Time—Governor not authorized to proclaim Daylight Saving Time.
Title 1, Section 12, Code of Alabama 1940—
Constitution, Sections 43 and 61.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

We have your request for an official opinion bearing date of April 9, 1946, which is as follows:

"Under the provisions of Title 55, Section 228, Code of Alabama 1940, I request your official opinion on the following question:

"Whether or not the Governor of the State of Alabama may by proclamation establish Daylight Saving Time within the State of Alabama?"

In my opinion the Governor has no authority to establish Daylight Saving Time as the legal time for Alabama for the reason that neither the Constitution nor the statutes expressly or impliedly authorize him to perform such act.

Title 1, Section 12, Code of Alabama 1940, provides as follows:

"§ 12. **Time; how computed.**—The time within which any act is provided by law to be done must be computed by excluding the first day and including the last; if the last day is Sunday, it must also be excluded, and the Monday following shall be counted as the last day within which the act may be done. **In designating the hours of the day, the time used shall be that of the ninetieth degree of longitude west of Greenwich, otherwise known as standard railroad central time.**"

Standard time or standard railroad central time is established by an Act of Congress, approved March 19, 1918, 40 Stat. 450, 15 U. S. C. A., Section 261. In my opinion standard time fixed by this Act of Congress is standard railroad central time as designated in the Alabama statute above referred to (Title 1, Section 12, Code of Alabama 1940).

In an opinion of this office rendered May 1, 1940, 19 **Quarterly Report of Attorney General** 120, we held in substance that whenever the statutes of the State of Alabama provide that an act must be performed at a certain time of the day such time is to be measured by standard railroad central time (central standard time) and not by daylight saving time.

In a later opinion of this office, rendered March 23, 1942, 26 **Quarterly Report of the Attorney General** 153, it was held that since Congress had established daylight saving time (War time) that such War time became standard time within the meaning of Title 1, Section 12, Code of Alabama 1940, and that, therefore, all official acts required to be done at a certain time by the Code should be performed by daylight saving (War) time as established by Congress.

It is generally known that by an Act of Congress approved September 25, 1945, c. 388, 55 Stat. _____, the Act of Congress placing the nation on War time was repealed, and standard time was re-established.

In view of the fact that Title 1, Section 12, Code of Alabama 1940, provides that "In designating the hours of the day the time used shall be that of the ninetieth degree of longitude west of Greenwich, otherwise known as standard railroad central time," it is my opinion that the Governor cannot by proclamation alter or vary the terms of this statute without first being authorized to do so by an Act of the Legislature. The **Constitution of Alabama of 1901**, Section 61, provides that "No law shall be passed except by bill . . ." Section 43 of the **Constitution** further provides " . . . The executive shall never exercise the legislative and judicial powers or either of them; . . ."

You are advised, therefore, that the Governor of the State of Alabama is not authorized under our present laws to proclaim that the legal time in the State of Alabama shall be changed from central standard time to daylight saving time.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

April 10, 1946.

Hon. Chauncey Sparks,
Governor of Alabama,
Capitol.

Act No. 418, Regular Session of the Legislature discussed generally.

Opinion by Assistant Attorney General Savage.

Dear Governor:

We have your letter of April 8, 1946, in which you ask the following questions in regard to Act No. 418, Regular Session of the Legislature of 1945:

1. Can money appropriated by the above mentioned Act be used to pay a debt of the University of Alabama incurred subsequent to the passage of said Act?
2. How is amount which can be used determined?
3. When can the money be released by the Governor?

Said Act of the Legislature appropriates a sum of money "for the payment of any outstanding debt of the State of Alabama or any of its agencies or institutions."

In interpreting or construing this Act, it becomes necessary to determine:

- (1) What constitutes a **debt** of the State of Alabama or any of its agencies or institutions as the term "debt" is used in said Act?
- (2) What is the significance of the word "outstanding" as used in next to the last line of Section 1 of said Act?

In the case of **Harman v. Alabama College**, 235 Ala. 148, the purpose of the suit was to test the right of Alabama College to borrow \$200,000.00 from the Federal Government for the erection of a co-operative house dormitory and

the beautification of the grounds connected with it; bonds were to be issued and such bonds were to be secured by pledging college fees and matriculation fees to be levied by the College on students, together with other moneys not derived from appropriations by the State to the College.

The authority to do the above was based on the Act of the Legislature of 1935, p. 1064 (General Acts of Alabama, Regular Session, 1935, p. 1064). Such Act provided that the bonds shall not be an obligation of the State and shall not be payable out of any moneys appropriated to the College by the State.

In the opinion in the above cited case, the court stated:

"The power here undertaken to be conferred is in essence the power to incur a debt, as we will undertake to show. The act carefully provides that it shall not be the debt of the State, but does not provide that it shall not be a debt of the college corporation. Unless limited in some way, the power to borrow money ordinarily implies the power to create a debt to that extent." (Act No. 80, Regular Session of the Legislature of 1945, conferred on the University the power to assume the payment of the Jefferson Hospital Bonds. In my judgment, the power to assume the payment of said bonds gave an implied power to create a debt.)

With the facts of the above cited case in mind, with reference to the manner in which the bonds were to be secured, the court, in its opinion, constantly referred to such obligation of the college as a debt. The court said:

"The debts so contracted are not state debts *** But we see no reason why such colleges and hospitals when incorporated, may not be given express legislative power to contract debts without thereby setting up a state debt. There is no prohibition in the constitution *** Their debts are not state obligations." (Said Act No. 418, it will be noted, not only authorized the payment of any outstanding debt of the State of Alabama, but also of any agency or institution of the State of Alabama.)

In the case of **Keller v. State Board of Education of Alabama**, 236 Ala. 400, the State Teachers College of Florence, Alabama, borrowed from the Federal Government (under the authority of said Act of 1935, supra) \$55,000.00 to construct a physical education building and swimming pool. For that purpose, the College issued its bonds securing the same by pledging rentals and fees for the use of said building and swimming pool, together with other moneys not derived from the general appropriation by the State to the College. This obligation or debt of \$55,000.00 was evidenced by a thirty-year amortization loan. In speaking of the bonds so secured, the court in this case said: "The special obligation bonds authorized by the governing board of the educational institutions of the State of Alabama which are to be payable solely from revenue derived from the operation of the project constructed from the proceeds of such bonds, are not debts of the governing board, the college or the State of Alabama within the meaning of any constitutional or statutory limitations." It will be noted in the next above quotation of the court that the court stated that such obligations were not debts **within the meaning of any constitutional or statutory limitations**. Therefore, such obligations, so secured, did not violate Section 213 of the Constitution of 1901, and were not construed to be a debt within the meaning of any constitutional or

statutory limitations, and in all of the cases involving bonds of colleges so secured, such securities have been attacked on the point that they would constitute debts **within the meaning of said Section of the Constitution**. In my judgment the court did not mean to hold that such obligations did not amount to a debt, moral or otherwise.

In my judgment, should the University assume the payment of the Jefferson County Hospital Bonds, and in the instrument in which the University assumes these bonds, it also agrees to abide by the terms of the Bond Agreement or Resolution pursuant to which said bonds were issued, I do not think there is any doubt but what such an arrangement would constitute a **debt** of the University as the term is used in said Act No. 418, supra. In this connection, it is to be noted that Jefferson County, in the Bond Agreement, Section 9 thereof, agreed among other things, "That all patients shall be charged rates at all times sufficient, in the aggregate, to pay the reasonable expenses of operation and maintenance of the hospital and to pay the principal, interest, and reserve requirements of the bonds." The Bond Agreement also provided that in case the county did not do this, the bondholders would have authority to appoint a receiver, and such receiver was given the authority under this Bond Agreement to operate the hospital and charge such fees as would be necessary to meet the payments of the bonds. In my judgment, such an arrangement, that is, the assumption by the University of said bonds, and of the Bond Agreement would clearly create a **debt** of the University which is authorized to be paid under said Act No. 418.

You will note that said Act No. 418 appropriates a sum of money for the payment of any outstanding debt of the State of Alabama, or any of its agencies or institutions. It is my interpretation of this Act that it authorized the payment of any outstanding debt of the University at the date of the passage of the Act, and of any outstanding debt of the University incurred subsequent to the passage of said Act. In my judgment, the payment of the debt by the State is not limited to the payment of an outstanding debt existing at the time of the passage of this Act.

The method of determining the amount of the appropriation is set out in the Act, and the yardstick to be used is adequate to set up a definite sum.

The amount in the income tax fund at the close of the fiscal year September 30, 1945, less the amount necessary to retire the bonds for which income tax funds are pledged, would leave the amount by which the appropriation is measured; since all the provisions of law applicable to the payment of the income tax bonds are taken into consideration and no more funds necessary than the complete retirement of the debt need be reserved on this point, and since the only provisions of law for the payment of the "old bonded debt" have been complied with. These provisions merely set up sinking funds from time to time as the Legislature has met, and the appropriations made therefor have been complied with and the money set up accordingly. There are no provisions for sinking funds for this debt by the 1945 Legislature. In determining the amount of the appropriation by this Act, the application of funds set aside for the old bonded debt payment is nil.

The provisions of Title 51, Section 424, requiring a replacement of any revenues lost by homestead exemptions have been complied with for the fiscal year ending September 30, 1945. The amount necessary to retire the income

tax bonds is \$13,995,745.00, which includes interest. The actual amount in the income tax fund at the end of the fiscal year September 30, 1945, is \$16,215,722.12. That leaves a balance of \$2,219,977.12, which is the amount of the net proceeds of the income tax collections after all appropriations and prior charges have been paid, and a sufficient amount has been set aside to comply with all the provisions of law with respect to the creation of funds for the payment of the outstanding income tax bonds and old bonded debt.

Therefore, it is my conclusion that said Act No. 418 appropriates the sum of \$2,219,977.12 to be released upon approval of the Governor. The Governor may release said amount at any time it is available.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

April 16, 1946.

Hon. Powell Hamner,
Sheriff, Walker County,
Jasper, Alabama.

Statutes—Repeal—Local Acts repealed by general act.

Local Act No. 500, Local Acts 1923, page 319, held repealed by General Act No. 81, General Acts 1943, page 86, in those counties in which the sheriff is not on a salary basis under and by virtue of constitutional amendment.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion, bearing date of April 2, 1946, is as follows:

"There has been a question raised by one of the State Examiners in regard to the Chief Deputy Sheriff's salary for Walker County, Alabama.

"In 1923, House Bill 964, by Act of the Legislature, a Local Bill was passed, setting the Chief Deputy Sheriff's salary at \$1800.00 per year. Then in 1943, there was a General Act affecting all counties except St. Clair County, amending Section 3 of Title 54, Code of Alabama, 1940, setting the Chief Deputy Sheriff's salary at \$2400.00 per year. Walker County has been operating under General Act No. 81, House Bill 214 by Stell, since it became a law.

"Will you please render me your opinion as to whether we are to operate under the Local Bill of 1923 or under the General Act of 1943. Your

immediate attention to this will be appreciated very much. Please mail a copy of your opinion to Mr. J. S. Freeman, Chairman of the Board of Revenue of Walker County, Jasper, Alabama."

In reply I wish to advise that in my opinion the provisions of the General Acts of 1943, page 86, Act No. 81, amending Section 3 of Title 34 of the Code of Alabama 1940, and setting the salary of the chief deputy sheriff of Walker County at not less than nine hundred dollars and not more than twenty-four hundred dollars per year, repeals the provisions of Local Acts 1923, page 319, Act No. 500.

A well-recognized rule of law provides that the presumption in a general act does not repeal a local statute. This rule of law with its inherent presumption recognizes, however, the necessity of giving way to a plain manifestation of a different legislative intent. The intention of the legislature must control.

In order correctly to arrive at the intent of the legislature governing matters of this nature it is proper that an examination be made of the subject matter with which the general act is concerned, taking into consideration the surrounding circumstances, other legislation and the purposes to be accomplished. *Shepherd, et al. v. Clements*, 244 Ala. 1, 141 So. 255.

From a reading of the Act of 1943, above named, it is clear that the legislature intended to establish a uniform basis for payment of chief deputy sheriffs throughout the State with the exception of St. Clair County which is specifically named in the Act itself. With the intent to establish a uniform system of law controlling a particular subject it must necessarily follow that local legislation to the contrary is intended to be repealed.

This opinion is limited to those counties in which the Sheriff is not on a salary basis under and by virtue of a constitutional amendment.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

April 17, 1946.

Hon. E. T. Knight, Chairman,
Board of Revenue,
Cullman County,
Cullman, Alabama.

Insane Persons—Sheriff's fees— .

Sheriffs held entitled to same fees for services rendered in summoning special jury to determine sanity of a person as are provided for similar services rendered in other cases.

Sheriff held entitled to fee of five dollars for summoning jury for inquisition concerning the sanity of a resident of the county.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion, dated April 1, 1946, is as follows:

"Re: Sheriff's Fees Summoning Special Jury in probate court to determine whether or not a person is of unsound mind.

"From time to time the question has come before the board of the legality of a claim by the sheriff against the county for a fee of \$5.00 for summoning each special jury in probate court to determine whether or not a person is of unsound mind.

"The Code of Alabama 1940, Title 11, Section 100, provides a fee to the sheriff as follows:

"'For summoning jury in capital case, or at any special court for the trial of a criminal to be paid out of the country treasury\$5.00.' but we have been unable to find a section that provides for the payment of summoning special jury in court to determine the sanity of a person and we shall appreciate your giving us an official opinion on the matter as soon as possible.

"To clarify the question further, the persons tried were not charged with any criminal or capital offense and were tried solely to determine whether or not he or she was of unsound mind.

"If the above mentioned fee of \$5.00 for summoning special jury in cases to determine the sanity of a person is not a legal claim against the county, how or from what source does the sheriff receive his fees in cases of this nature?

"May we hear from you at an early date?"

In reply I wish to advise that the answer to your question is controlled by the provisions of **Code of 1940**, Title 11, Section 34, the pertinent part reading as follows:

"Sheriffs are entitled to receive the following fees for the following services: . . .

"Services in relation to persons of unsound mind the same fees as are allowed for similar services in other cases, to be paid out of the county treasury if such persons have no estate."

This section of the Code of 1940 appeared in the Code of 1923 as Section 7287, and was construed by this office in an opinion to Hon. M. W. Forman, Judge of Probate, St. Clair County, Ashville, Alabama, under date of March 26, 1938, reported in **Biennial Report of Attorney General**, October 1, 1936, to September 30, 1938, at page 593. In this opinion it was held that fees due the Sheriff should be paid from the estate of the insane person if solvent, if not the said fees may be paid by the county upon return of execution "no property found."

It is my opinion that no change in the law has occurred affecting your question and that this method of payment of the sheriff's fees still controls. **Code of Alabama 1940**, Title 11, Section 100, does not, in my judgment, control your question, nor is the fee provided by Title 11, Section 100 of the **Code of 1940**, the proper fee to be charged by the sheriff in cases of this nature.

I wish to call your attention to an additional provision of Title 11, Section 34 of the **Code of 1940**, which provides as follows:

"Sheriffs are entitled to receive the following fees for the following services: . . .

"Summoning a jury for any inquisition in the county, or under a writ of ad quod damnum, or dower, and attending on such jury, and taking inquest, per day when no other provision is made by law\$5.00."

It is my opinion that this provision of law controls the amount of the fee to be charged by the sheriff in cases of this nature.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

April 17, 1946.

Hon. Frank Bunkley,
Commissioner of Licenses,
Mobile County,
Mobile, Alabama.

Code 1940, Title 51, Section 850—

Where the amount of a license is rated according to the population of the municipality, determination is made on the basis of the last preceding United States census.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of April 10, 1946, is as follows:

"During the closing days of the last legislative session an act was passed by the Mobile delegates expanding the city limits of the City of Mobile. This law greatly increases the licenses to be paid by merchants and filling stations who are taken into the city of Mobile under the act. There is some doubt in my mind as to when these merchants should pay the increased license. I am under the impression that the amount of licenses paid is determined by the last census and would like your official opinion as to whether this increase was due on the 1946 license or not."

Where the amount of license is rated according to the population of the municipality, it is my opinion that the license to be paid is determined by the last preceding United States census.

Your attention is specifically called to our Alabama Code of 1940, Title 51, Section 850, which incorporates therein the following:

" ***In all cases where the amount of license is rated according to the population of the town, city or county, the population of such town, city or county as fixed by the last preceding United States census shall govern."

In our Alabama Code of 1940, Title 1, Section 14, the 1939 Legislature enacted a statute particularly applicable to laws requiring classification based on the federal census. This statute provides as follows:

"The ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the regular decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census."

The ninetieth day after the first day of the first legislative session held next after the publication by the federal government of the regular federal decennial publication was last determined to be August 2, 1943. **Quarterly Reports of Attorney General**, Volume 30, page 86. At that time reclassification within the State on the basis of the 1940 federal census was officially effected.

Construing the above Code sections, it is my opinion that an increased payment on business licenses was not due on the 1946 fee where a city extended its corporate limits in 1946, and where the pre-existing license amount was determined on the city's last federal census publication figure. Current license fees by virtue of Title 51, Section 850, appear to be arrived at on the basis of the last federal census and apparently remain on such basis until reclassification is officially effected in accordance with Title 1, Section 14.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

April 17, 1946.

Hon. E. P. Russell, Director,
Department of Corrections and Institutions,
Montgomery 4, Alabama.

Department of Corrections and Institutions—Probation—Costs and Fees—

Department of Corrections and Institutions must pay court costs when defendant placed on probation.

Sheriffs—Department of Corrections and Institutions—Informers' Fees—Probation—

Sheriffs entitled to informers' fees from funds of Department of Corrections and Institutions even though defendant placed on probation.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of March 13, 1946, is as follows:

"In discussing other matters with the Governor today he expressed doubt as to the liability of the Department of Corrections and Institutions for court costs in cases where no prison sentence is imposed. The department has been paying court costs in certain cases placed on probation.

"We would also like an opinion as to the liability of this department for sheriffs fees and informers fees where violators of the prohibition law are placed on probation."

You are advised that if no prison sentence is imposed or if no sentence of hard labor for the county is imposed no application for probation could be made. The Probation Act, Title 42, Section 19-26, Code of Alabama 1940 as amended by Act number 426, General Acts 1945, provides for the suspension of sentences which have been imposed by a court. This procedure is called "probation" and obviously unless a sentence to the penitentiary or to hard labor for the county is imposed there could be no question of probation.

You are advised, however, that when a sentence to the penitentiary or to hard labor for the county is imposed by the court but suspended under the provisions of the Probation Act the Department of Corrections and Institutions must nevertheless pay the enumerated court costs under Title 4, Section 69, Code of Alabama 1940. This is true, for, although Title 45, Section 72 provides that no costs shall be paid until the convict has been delivered to the penitentiary officials, Title 42, Section 25, Code of 1940, as amended by Section 4 of Act Number 426, General Acts 1945, provides for the payment of court costs as if no suspension of sentence or probation had intervened. See 21 **Quarterly Report of the Attorney General**, page 27, and 17 **Quarterly Report of Attorney General**, pages 87, 94.

The same reasoning requires the payment of sheriffs' or informers' fees. Title 29, Section 102, provides for a fee of \$50 to the person furnishing evidence and bringing about the conviction in a distilling or manufacturing case. Sections 257 and 258 of that title require the convict department or the county to pay this fee or reward depending on whether the conviction was to the penitentiary or to the county for hard labor. It is true that these sections require a certificate stating that the convict has actually begun to work out the sentence imposed, but it is my opinion that the \$50 informer's fee is also payable when probation has been extended. Section 4 of Act Number 426, General Acts 1945, provides in substance that all allowances, fees of officers of the court when sentence is suspended shall be paid in the same manner as if no suspension of sentence had intervened. You are advised, therefore, that the sheriff's or informer's fee should be paid out of the convict fund even though the defendant is put on probation. 36 **Quarterly Report of Attorney General**, page 23; 22 **Quarterly Report of Attorney General**, page 83.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

April 17, 1946.

Hon. A. B. Robertson,
President,
Board of Revenue,
Barbour County,
Clayton, Alabama.

Attorneys—Title 15, Section 318, Code of Alabama 1940, as amended by General Acts of 1943, page 220—

Appointed counsel may be entitled to fee even though no trial takes place. Court of County Commissioners authorized to pay attorney's fee under Title 15, Section 318, upon receipt of certificate of presiding judge.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated April 5, 1946, is as follows:

"Please give me an official opinion as provided for under Section 240, Title 55, Code of Alabama, 1940, on question of law as follows:

"Peter Paul Hall was separately indicted by a special Grand Jury of Barbour County, Alabama, on the charge of murder and rape, both capital offenses. He was tried at a special term of the circuit court of Barbour County, Alabama, for murder, July 17th, 1945, convicted of first degree murder, sentenced to be electrocuted, and was electrocuted January 18th, 1946. The charge of rape is still pending, and, of course, will be dismissed.

"The court appointed two attorneys to represent the defendant; they performed their duty, representing him on the charge of murder. They presented their bill for this service and the same has been paid. They now present their bill for representing the defendant on the charge of rape, although the defendant was not tried for rape, nor will be tried.

"Please advise if the Board of Revenue of Barbour County, Alabama, is authorized to pay this account for service not performed, although the attorneys were appointed to represent the defendant for rape, and would have performed such duty had the defendant been also tried for rape."

In my opinion the Board of Revenue of Barbour County is authorized to pay the account above referred to upon receipt of a certificate from the presiding judge as prescribed by Title 15, Section 318, Code of Alabama, as amended by General Acts 1943, page 221.

Title 15, Section 318, Code of Alabama, as amended by General Acts 1943, page 221, provides as follows:

"§ 318. When counsel appointed for defendant in capital case.—When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him if confined, at all reasonable hours, and as compensation for said defense the attorney or attorneys so appointed shall be entitled in each case to a fee fixed by the judge presiding at said trial, which fee shall be not less than fifty (\$50.00) dollars, nor more than one hundred (\$100.00) dollars, to be paid out of the county treasury. Said presiding judge in the case shall certify to the board of county commissioners, or like governing body, of the county that 'The attorney or attorneys appointed by the court in the case of Alabama vs. _____ (name of defendant) has (or, have) performed the service required of him (or, them) in representing the said defendant and that the fee therefor has been fixed in the sum of _____ Dollars (Designate amount of fee).' Whereupon a warrant shall be drawn in favor of the attorney or attorneys upon the general funds of the county in payment therefor."

When counsel are appointed by the trial judge and perform the services required of them they are entitled to compensation from the general funds of the county. The fact that there is no actual trial of the case in which counsel are appointed does not necessarily show that counsel have not performed any services at all. There are many duties and services that appointed counsel must perform prior to the trial of the case. If it results, however, as in the case described in your inquiry that no trial can be had it becomes the duty of the presiding judge in the case to certify to the board of county commissioners whether the attorneys appointed by the court have performed the services required. It also becomes the duty of the presiding judge to set the amount of counsel fees. Upon receipt of the certificate of the presiding judge, the court of county commissioners should, therefore, pay the fee from the general funds of the county. In my opinion his certificate, stating that the attorneys have performed the services required of them can be taken as conclusive of the fact by the court of county commissioners.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

April 18, 1946

Hon. S. E. Boozer,

Judge of Probate,

Calhoun County,

Anniston, Alabama.

Acts 1945, p. 570—Code 1940, Title 51, Section 835(c)—Veterans' Exemptions—Penalties for delinquencies.

A veteran entitled to exemptions under Act No. 353, H. 352, approved July 6, 1945 (General Acts 1945, p. 570), reported delinquent as to payment of a license or occupation tax is not entitled to apply any part of the exemption to payment of the penalty imposed upon delinquents under Code 1940, Title 51, Section 835(c). Such penalty must be paid before the license issues to such delinquent.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

We have your request for an official opinion bearing date of April 12, 1946, which is as follows:

"Kindly advise me on the following questions:

"(1) Whether or not a veteran who is entitled in all respects to the benefits under Act #353 (approved July 6, 1945), but who has engaged in business and has been delinquent for several months in applying to the Judge of Probate of his county to claim his exemption under said Act, must pay any penalty under Section 835, Title 51, of the 1940 Code of Alabama where his business license does not exceed \$35.00.

"(2) If your answer to (1), above, is that the veteran does not have to pay any penalty, should the license inspector be called upon to refund the amount of penalties heretofore collected and paid over to him from veterans entitled to the benefit of said Act but delinquent in applying for their exemption?"

The penalty imposed by Code 1940, Title 51, Section 835(c), for delinquency in payment of licenses "must be collected *** when the license is taken out together with interest at six percent from the date of delinquency." The probate judge is not authorized to issue a license to the delinquent without payment of the penalty (*Burnette v. State*, 28 Ala. 110); and the penalty accrues when delinquency is reported and must be paid when the license tax is paid. *State v. State*, 230 Ala. 657.

Tax exemption statutes are construed strictly in favor of the taxing power and against the taxpayer. I find nothing in the Act in question, No. 353, approved July 6, 1945 (Gen. Acts 1945, p. 570), to warrant the inference that any part of the exemption or credit of \$35.00 thereby allowed to veterans can be

applied to payment of penalties imposed by Section 835(c) upon delinquents. The exemption or credit, in my opinion, is allowed and is to be applied exclusively to payment for licenses.

In my opinion, a delinquent veteran must pay the penalty as required by Title 51, Section 835, whatever the amount of the license may be, before he is entitled to a license.

It necessarily follows that where the penalty has been paid and a license issued there is no duty on the license inspector to refund the penalty so paid.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

April 22, 1946.

Hon. J. H. Dobbins, Clerk,

Circuit Court of Calhoun County,

Anniston, Alabama.

Appeals—Circuit Court Clerks—Recorder's Court—

Appeals from recorder's court to circuit court in which bond is not approved by the recorder are not perfected as required by law and should not be docketed by the circuit clerk.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter requesting an official opinion, dated April 10, 1946, is as follows:

"I would like to know if the clerk of the circuit court should docket city cases appealed from recorder's court where the recorder did not approve the appeal bond; notwithstanding the fact that the judge of the circuit court ordered same to be done.

"I have a number of cases appealed from recorder's court without the bond being approved.

"Under Title 37, Section 587:

"In any case the defendant may take an appeal to such court by giving bond with good and sufficient sureties, payable to the city, to be approved by the recorder or officer trying the case."

"I would like an early reply as a number of such cases are being brought to this court now."

In reply I wish to advise that in my opinion the clerk of the circuit court should not docket city cases appealed from recorder's court where the recorder did not approve the appeal bond. The appeal is not perfected until the bond is made in compliance with the clear mandate of the statute. Under Title 37, Section 587 of the Code of 1940, provisions for an appeal are made, but the statute must be followed as set out in order that a valid appeal may be taken. The appeal bond is a prerequisite for this appeal and it has been held that where an appeal is taken without compliance with this essential the judgment rendered is a nullity. See *Doyle v. Mobile*, 12 Ala. App. 622, 68 So. 494.

The bond here mentioned must be approved in compliance with the statute. *Steele v. Oxford*, 25 Ala. App. 529, 149 So. 722.

Since no appeal is perfected until the bond here named is properly approved by the recorder or officer trying the case, the case cannot properly reach the docket of the circuit court for trial, the appeal itself not having been perfected as required by law.

It is, therefore, my opinion that you as clerk are not required by law to docket cases from the recorder's court, in which an appeal bond is not approved in accordance with law.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

April 22, 1946.

Mr. Lawrence A. May,
First Assistant State Service Commissioner,
Department of Veterans' Affairs,
P. O. Box 1509,
Montgomery 2, Alabama.

1. Act No. 173, General Acts 1945. (Section III.)

2. Since present members of the State Board of Veterans Affairs were appointed as of October 1, 1945, "for a term of four years," new appointments should be made as of October 1, 1949, and present or old members of the board may be reappointed upon expiration of their four-year term.

3. New appointments as members of the State Board of Veterans Affairs should be made only upon termination of the four-year term of the present appointments, except where vacancies occur because of death or resignation of any member of the board before the expiration of the four-year term, in which case such vacancies should be filled by appointments for the unexpired term.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion, dated March 27, 1946, is as follows:

"Your official opinion is requested by this department on the following:

"Reference is made to Section III of Legislative Act No. 173, Regular Session, 1945. The present members of the State Board of Veterans Affairs of Alabama were appointed as of October 1, 1945, for a term of four years from said date. Is it the mandate of the law that new members of the Board shall be appointed after the expiration of the four year terms of the present members of the Board, or should new members be appointed each succeeding year after this department came into official being? On what dates should the appointments be made?

"This requested opinion will be appreciated."

Section III of Legislative Act No. 173, Regular Session, 1945, provides in part as follows:

"Section III. Composition, Terms and Duties of Board.—The State Board of Veterans Affairs shall consist of the Governor, as Chairman, and representatives to serve for a term of four years from the date of their respective appointments, who shall be selected from the memberships of

the Alabama Department of The American Legion, the United Spanish American War Veterans, the Veterans of Foreign Wars, and the disabled American Veterans, the nomination of such representatives to be made by the Executive Committees of (sic) similar governing bodies of the respective organizations on the following ratio of said membership as existing on July 1st of the year in which they shall be appointed, said appointment to be made by the Governor; to-wit: There shall be one representative from each of said organizations for the first 7500 resident members or fraction thereof, and one additional representative from each such organization for each additional 7500 resident members or fraction thereof, the total memberships of the respective organizations to be determined as of July 1st of the year in which such representatives shall be designated from the State enrollment of such organization, duly verified as correct by the Adjutant or similar officer of said organization, provided that the Executive Committees or similar governing bodies of the above named organizations shall each nominate to the Governor three veterans who are members of such organizations, for each place on the Board to which said organizations are entitled; provided further that said nominations shall include in representative proportions veterans of every war which are included in the membership of said organizations. The said Board shall have authority to grant representation thereon, and on the same basis of membership as hereinabove, to any organization of veterans of the second World War having a national charter authorized by an Act of Congress and operating through local organizations in Alabama."

I assume from your inquiry that the point in question is that if the membership of a veteran organization as existing on July 1 of each year is such as to authorize an additional representative or representatives on the State board, should new members of the board be appointed at that time even though the four-year term of the then present members has not expired?

My answer to this question is: "No." It is my opinion that it is the intention of this legislation that the State Board of Veterans Affairs shall be composed of the Governor, as Chairman, and the same members appointed for a term of four years and that new appointments be made only upon termination of the four-year term of the present appointments.

Since the present members of the State board were appointed as of October 1, 1945, their term of office expires as of September 30, 1949. Therefore, new appointments should be made as of October 1, 1949, the number of representatives to be appointed at that time from each veteran organization to be determined according to the total membership of that organization as existing on July 1, 1949. Four years later new appointments should again be made as of October 1, 1953, representation based on membership of each organization as existing on July 1, 1953.

I see nothing in the Act to prevent the reappointment of present or old members of the board upon expiration of their four-year term.

If a vacancy occurs because of resignation or death of any member of the board before the expiration of the four-year term, it is my opinion that such vacancy should be filled by appointment of a new representative for the unexpired term.

Therefore, in answer to your inquiry, it is my opinion that new appointments should be made only after the expiration of the four-year term of the present members of the board, except to fill an unexpired term, as provided above, the number of representatives from each organization to be determined according to the total membership of that organization as existing on July 1 of the year in which new appointments are to be made upon expiration of the four-year term of the board.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

May 20, 1946.

Hon. C. H. Keller,
Register Circuit Court,
Cullman County,
Cullman, Alabama.

Costs—Next friend of minor plaintiff liable for costs.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated April 17, 1946, is as follows:

"Would appreciate an opinion from your office regarding following questions:

"1. Where a suit is filed by party as next friend of minor, where minor is unsuccessful in suit and court taxes cost against complainant minor and where such minor has no property from which costs could be made, is party who sues as next friend liable for cost personally?

"2. Where suit is brought by guardian of non compos mentis, minor, or by administrator of estate of deceased person, and where such guardian or administrator is complainant in suit, is unsuccessful in suit and court taxes cost against complainant, is the surety on the bond of such guardian or administrator liable for costs?"

In answer to your question numbered one, you are advised that a party who sues as next friend for a minor plaintiff is liable personally for costs.

In the recent case of **Barker v. Byars**, 245 Ala. 223, 16 So. 2d. 504, it was stated:

" Mr. Justice Mayfield, in discussing the relationship of the next friend to the litigation said: 'While a next friend is any one who will undertake to prosecute the suit of an infant or person under legal disability and is not technically speaking, a party to the suit, yet he is a party within the contemplation of the statutes and the practice of the courts as to the conduct of the suit.'

"The next friend is responsible for the payment of costs. *Smith v. Gafford*, 33 Ala. 168; *Perryman v. Burgster*, 6 Porter 99.

"Since the next friend is liable for costs surely the next friend should have the right to challenge the propriety of the costs imposed against him"

It is our interpretation of this decision that the next friend or guardian of an infant plaintiff is personally liable for costs. See also 43 C. J. S., page 370, and *Ward v. Mathews*, 122 Ala. 188, 25 So. 50.

Before answering your question numbered two above, you should furnish us with a copy of the bond entered into by the guardian and the administrator referred to in your inquiry. Upon receipt of this information we shall be glad to give you our opinion on question 2.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

May 23, 1946.

Hon. O. L. Andrews,
Clerk Circuit Court,
Tenth Judicial Circuit of Alabama,
Jefferson County,
Birmingham, Alabama.

Code 1940, Title 11, Section 7—Code 1940, Title 13, Sections 471—474.

Sale of real estate upon judgment rendered in justices of the peace court or court of like jurisdiction.

The provisions of law whereby real estate may be sold upon execution issued upon a judgment in the court of a justice of the peace in cases where defendant in judgment has insufficient personal property to satisfy the same are not available to a justice of the peace or the clerk of a court of like jurisdiction for collection of costs in cases where costs have been taxed against the plaintiff pursuant to Code 1940, Title 11, Section 7.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, dated March 29, 1946, is as follows:

"We have had several motions to sell real estate under executions issued by Municipal Court of Birmingham, Third Division. Said executions were issued under Sec. 7, Tit. 11 of 1940 Code of Ala., for court cost accrued at instance of the plaintiff after execution against the defendant was returned 'No property found.' The execution was issued in the name of the clerk and motion to sell real estate filed in this court was also filed in the name of the clerk of the Municipal Court of Birmingham.

"Sections 471, 472, 473, 474, Title 13, Code of Alabama 1940, deal with order of sale and motions therefor. The aforesaid sections do not appear to support an order for sale of real estate unless a levy is made under an execution for collection of a judgment rendered against a defendant and then the party having the judgment must institute the proceeding.

"I will greatly appreciate your opinion as to just what right, if any, the clerk of the Municipal Court of Birmingham, Third Division, has to initiate a proceeding in this court to sell real estate. I have several cases that have been dismissed, thereby taxing the cost in this court against movants who were successful defendants in the lower court. Said movants have refused to pay cost on the grounds that the clerk of the Municipal Court on his own initiative and without their knowledge or consent filed the proceedings in this the circuit court to sell real estate of unsuccessful plaintiffs in an effort to collect court cost.

"I thank you for your assistance in the past and will highly appreciate an early answer to this request."

For answer to the foregoing, I am unable to find any provision of law whereby the clerk of the Municipal Court of Birmingham, Third Division, is authorized to file a motion in the Circuit Court for the sale of real estate in cases where costs have been taxed against plaintiff in said municipal court, pursuant to Code 1940, Tit. 11, Sec. 7.

The provisions of law for sale of real estate upon a judgment rendered by a justice of the peace or other court exercising like jurisdiction under Sections 471-474 of Title 13, are, in my opinion, available only to a plaintiff holding a judgment rendered in such inferior court, where such judgment has not been satisfied for lack of sufficient personal property of the defendant to satisfy the same. By the very terms of the statute, such procedure is available only to such a plaintiff, and cannot by implication be extended to the justice of the peace or to the clerk of an inferior court exercising the jurisdiction of justice of the peace, where costs have been taxed against the plaintiff in the lower court as provided in Sec. 7 of Title 11.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

June 5, 1946.

Mr. G. R. Dollar, Chairman,
Commissioner's Court,
Winston County,
Double Springs, Alabama.

Winston County—Funding Road, Bridge and Registered Claim Bonds (1949)—Winston County Highway Board—Gasoline Tax Fund—Code 1940, Tit. 51, § 647, as amended (Gen. Acts 1943, p. 442).

1. The gasoline excise tax fund levied under Code 1940, Tit. 51, § 647, as amended (Gen. Acts 1943, p. 442) cannot be used to pay interest on or the principal amount of bonds issued by Winston County due in 1949 and known as Funding Road, Bridge and Registered Claim Bonds of Winston County, Alabama, dated May 1, 1919, and maturing May 1, 1949.

2. Said bonds and interest thereon should be paid either out of the general fund of the county or by levy of a special tax as authorized under Constitution 1901, § 215.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, dated April 15, 1946, is as follows:

"We are enclosing herewith a copy of a special report made by Messrs. J. A. Turnipseed and W. T. O'Hara, Assistant Examiners of Public Account, to the Governor, relating to the issuance of \$54,000.00 of FUNDING ROAD, BRIDGE AND REGISTERED CLAIM BONDS OF WINSTON COUNTY, ALABAMA Dated May 1, 1919 and maturing May 1, 1949, and based upon the information, facts and figures contained in said special report, and for the purpose of clearing up all legal questions and to avoid any unnecessary litigation in respect to the actions of the Court of County Commissioners and the Winston County Highway Board heretofore taken in paying the interest on the entire amount of said bonds which matured on and after May 1, 1933, wholly out of the Gasoline Fund, as authorized, originally, under the "Bonner Bill" (Acts 1932, Extra Session, pages 225-226), approved November 8, 1932, and now authorized under Section 647, Title 51, of the 1940 Code of Alabama, and to establish whose liability it is, and out of what fund the future interest on said bonds may be paid, and, out of what fund or funds the principal sum of said bonds may be paid at maturity on May 1, 1949, and the manner of the payment of said bonds, including the interest thereon, I desire your official ruling upon the following questions:

"1. Was it legal for the Court of County Commissioners of Winston County, under the provisions of said "Bonner Bill" as originally passed and now under the provisions of Section 647, Title 51 of the 1940 Code of Alabama, to pay the interest on the whole amount of said bonds, out of the Gasoline Fund, then under its control, so long as such payments did not exceed one-third of such revenue?

"2. Was it legal for the Winston County Highway Board, subsequent to its investment of the full authority over roads, bridges and ferries of Winston County, and the control of the Gasoline Fund, by Local Act #333 (Local Acts 1939, page 221) approved September 5, 1939, to continue to pay such interest out of the Gasoline Fund, so long as such payments did not exceed one-third of such revenue?

"If your answers to questions Nos. 1 and 2 are in the affirmative, and you rule the Winston County Highway Board may continue to pay the interest on said bonds, as same falls due between this date and the maturity date of said bonds, out of the Gasoline Fund, would the Highway Board have the choice of paying off said bonds by establishing a sinking fund, out of the Gasoline Fund, each month, in an amount sufficient to retire said bonds at maturity, provided said sinking fund did not, in any one month, exceed one-third of said revenue, or could it wait and at a proper time, but not later than May 1, 1949, issue State Gasoline Revenue Tax Warrants in an amount not to exceed \$54,000.00, and maturing over a period of time, not to exceed ten years, and use the proceeds thereof to pay off the said bonds, provided it did not use more than one-third of said revenue in any one month, to pay both principal and interest, as provided under said Section 647, Title 51 of the 1940 Code of Alabama?

"If your answers to questions Nos. 1 and 2 are in the negative, then advise whose liability it is to pay said bonds, and out of what fund or funds may be paid both principal and interest, and the manner of payment, since there has been no levy of any kind for the purpose of setting up a sinking fund to retire any part of the principal of said bonds, and no levy since February, 1933 to pay the interest on said bonds.

"Owing to the fact that on May 1, 1946, the semi-annual interest amounting to \$1,350.00 will mature on said bonds, your answer to these questions not later than May 1, 1946, will be appreciated."

Code 1940, Title 51, § 647, as amended (Gen. Acts 1943, page 442), provides that the revenue from the so-called gasoline excise tax "shall not be used for any purposes other than for the construction, improvement and maintenance and supervision of highways and bridges and streets, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes." This section, as amended, further provides that "the governing body of each county in Alabama is authorized to expend an amount not to exceed one-third of the total amount of such revenue that may be received by such county in the payment of any debt that may have been incurred by such county for the construction or maintenance of roads or bridges."

It is apparent that the legislature thus drew a distinction between the payment of bonds (necessarily including interest thereon) and payment of debt incurred for construction or maintenance of roads and bridges, and that the legislative intent was to restrict use of the fund, so far as bonds were concerned, to payment or "retirement" of such bonds as were secured by pledge of the fund.

It follows that the fund was not to be used for retiring or paying bonds, or interest thereon, in cases where the fund had not been pledged for that purpose.

Thus it is seen that the concluding sentence or provision of the statute as to "payment of **any debt** that may have been incurred *** for the construction or maintenance of roads or bridges" must be construed to apply only to debt other than debt evidenced by bonds.

In addition to this, Section 655 of Title 51, with reference to the county's part of the fund, makes it a misdemeanor to use the fund otherwise than as provided, and vests the Highway Department with supervision over its expenditure and imposes on the department of finance the "duty of examining into and determining each year whether or not such funds have been used or expended as herein provided."

With reference to the counties' part of the revenue, under Section 657 of Title 51, as amended (Gen. Acts 1943, p. 21, § 2), it is provided that such fund shall be used "exclusively for the construction, maintenance, supervision and policing of the public roads and bridges."

The foregoing, in my opinion, is sufficient to show that the funds in question cannot be used to pay or retire bonds, or to pay interest thereon, in any case where the bonds are not secured by pledge of the fund.

From the report of the examiners to which you refer, it appears that the bonds in question were issued pursuant to an election held April 10, 1919, "for the purpose of paying debts already created for constructing public roads and bridges *** and registered claims against the county," pursuant to Code 1907, Ch. 11, Art. 8, §§ 158, et seq., and that the notice of the election was to the same effect.

At a meeting of the Commissioners Court held in April 1919, after the election, as shown by the minutes of the meeting as copied on pages 4 and 5 of the examiners' report, an order was entered as follows:

"It is further ordered, that there be and there hereby is levied upon all the taxable property in the County of Winston, Alabama, for each of the years 1919 to 1949, both inclusive; as special tax sufficient in amount to pay the interest on all said bonds as the same falls due and to provide a proportionate part of the principal thereof, and the proper officers of said County are hereby commanded, annually, to extend, assess, levy and collect said taxes, or that there shall be reserved out of the general tax levied each year, a sum sufficient to pay the interest on all the said bonds and to provide a proportionate part of the principal thereof, which said sum so levied or reserved shall be set aside and placed in a separate fund and be used only for the purpose of paying the interest and principal of the said bonds, and the said County of Winston hereby declares that the foregoing provision of the levy, assessment and collection of taxes to pay the interest and principal of said bonds is made for the benefit of each and every person, who may be or becomes the owner or holder of any of the said bonds or coupons."

The form of the bonds and interest coupons, issued pursuant to the election, as shown on page 6 of the report, indicates no pledge of any special fund or tax for their payment. As indicated by the excerpt from the minutes above quoted, the intention was that interest should be paid either by a special tax to be levied each year as authorized by Section 215 of the Constitution of 1901, or out of the general tax levied each year, and that a sinking fund for the ultimate payment of the principal amount of the bonds was likewise to be created from one source or the other.

On page 7 of the report, there is a copy of a certificate executed March 12, 1920, by the Probate Judge and the County Treasurer, jointly, to the effect that "Board, Bridges and Registered Claim warrants of Winston County, Alabama, aggregating the sum of \$54,267.34" were paid on that day and "retired and cancelled simultaneously with the issuance of \$54,000.00 of Winston County, Alabama Road, Bridges and Registered Claim bonds, dated May 1, 1919, numbered from 1 to 54, inclusive."

Thus it is clear, I think, that the bonds in question were authorized and issued not only to pay outstanding claims for the construction of roads and bridges, but also to pay other registered claims unconnected, so far as appears, with roads or bridges, the amount of which is not disclosed by the report.

However that may be, the debt previously incurred by the county for roads and bridges, whatever its amount may have been, was paid and extinguished from the proceeds of the bonds thus sold. There was no longer a debt against the county for the construction of roads and bridges. True it is the county incurred a new debt, evidenced by the bonds. The new debt, so far as appears from the bonds themselves, was merely a general obligation of the county, unconnected with roads or bridges, to be paid either by levy of a special tax as authorized by Section 215 of the Constitution, or out of the general fund, as the county governing body might subsequently from year to year elect.

It is an elemental principle of law that the payment of satisfaction of a debt or obligation, however or in whatever manner it may be accomplished, operates to discharge or extinguish the debt or obligation. 48 C. J. 630, § 67; 31 Words & Phrases (Perm. Ed.), 482 and cases cited. Nor can an obligation which has been extinguished by payment be subsequently revived or transferred. See also **Bradley vs. Graves**, 46 Ala. 277; **Hemphill vs. Moody**, 64 Ala. 468.

It is clear, therefore, that upon payment of the claims for payment of which the bonds in question were issued, the county's debt represented by such claims, including debt for construction of roads and bridges, was extinguished. The new debt created by the bonds did not take on the character of a debt for construction of roads and bridges, and does not therefore fall within the description of debt in Section 647, Title 51, as amended, *supra*, for payment of which a county may expend not exceeding one-third of its gasoline tax fund.

I find nothing in the Local Act, whereby the Winston County Highway Board was created (Local Acts 1939, p. 221), that can affect the conclusion above stated. That Act operated merely to divest the jurisdiction over roads

and bridges and the administration of the gasoline tax fund out of the Court of County Commissioners of Winston County, and vest the same in the newly created Highway Board of said County. What the court was powerless to do in the administration of the fund, the Board is likewise without power to do. Section 8 of the Act expressly provides that "except so far as the same may be in conflict with the provisions of this Act, the general laws now in force in this State with reference to public roads, public highways, ferries and bridges shall be in full force and effect in Winston County, Alabama."

I am of opinion, therefore, that each of your questions numbered 1 and 2 must be answered in the negative. The result is that your remaining questions cannot be answered, except to say that in my opinion the liability represented by the bonds must be satisfied either out of the county's general fund or by levy of a special tax under Section 215 of the Constitution as contemplated when the bonds were issued and as shown by the order of the county governing body at that time.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

June 10, 1946.

Hon. O. L. Andrews,

Clerk Circuit Court,

Tenth Judicial Circuit of Alabama,

Jefferson County,

Birmingham, Alabama.

Probation—Sheriffs—Clerk's fees—Sheriff's fees.

Clerk not authorized to summon witnesses on hearing for revocation of probation.

Sheriff entitled to fee for arresting probation violator.

Clerk not entitled to fee for issuing warrant of arrest for probation violator.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated March 20, 1946, is as follows:

"The Legislature on July 7, 1945, amended the Probation Law under Title 42 Sections 20, 21, 24 and 25 of the Code of 1940, Section 4, allowing

a charge of fees to be charged against delinquent probationers, etc. The Section reads as follows:

"Section 4. That Section 25 of Title 42 of the Code of Alabama of 1940 be amended so as to read as follows: Section 25. Costs and Fees: Any provision of law to the contrary notwithstanding, allowances, costs and fees of officers of courts and of state witnesses, including arrest fees for delinquent probationers upon order of the court or probation officer, in any cases in which sentence is suspended, and the defendant put on probation, shall be paid in the same manner and from the same funds or sources as if no suspension of execution of sentence had intervened. The clerk of the court, in addition to the usual fees now allowed him by law in criminal cases shall be allowed a fee of one dollar in each case for his services in keeping a probation docket and one dollar for forwarding the probation file in duplicate to the Board of Pardons and Paroles, all of which fees if not paid by the probationer shall be payable out of the funds of the State Department of Corrections and Institutions as other such court costs are now paid.'

"There is a question in our minds as to whether or not, in the following instances, a charge should be made against the Department of Corrections and Institutions, or if the probation officer should see that the defendant pay additional costs to cover same. May we have your opinion on the following questions:

"(1) When the court orders a warrant to be issued for a delinquent probationer and the warrant has been issued for some time, and up until this date no return has been made on the warrant, and because the defendant has not been apprehended this warrant has been put in the inactive file in the Probation Office, is the clerk entitled to collect from the Department of Corrections and Institutions the costs that have accrued since the defendant was probated? When defendant is probated we immediately send a cost bill to the Department of Corrections and Institutions and are paid on these cases. So please take notice that the fees I am asking about are fees that have accrued after defendant has been probated and has become delinquent.

"(2) A defendant is probated and becomes delinquent and the court orders a warrant for his arrest and the warrant is returned "not found;" the other facts being as stated in question (1), should the clerk collect the additional costs accrued from the Department of Corrections and Institutions?

"(3) A warrant is issued for a delinquent probationer and the defendant is arrested, committed to jail, and the court releases him to continue on probation, should the clerk collect from the Department of Corrections and Institutions the costs accrued on this arrest, etc., and should the Probation Officer or the court require the defendant to pay these additional costs?

"For your information may I cite one case; On January 28, 1944, this defendant was placed on probation; on May 5, 1944, the court ordered his arrest because he had violated the terms of his probation; on May 11,

1944, the writ of arrest was withdrawn; on August 5, 1944, another warrant of arrest was issued, and on August 11, 1944 he was committed to jail, and on August 19th he was ordered released from jail, and on October 20 another warrant was issued. The defendant on November 24, 1944, was again released on probation. In this instance the defendant had paid all costs that had accrued up to the date he was sentenced and probated, but when he was released on November 24, 1944, neither the Probation Officer nor the court required him to pay the costs accrued on these three arrests, and neither have we sent a cost bill to the Department of Corrections and Institutions. I am merely citing this case in order that you might understand our predicament in some of the probation cases where defendants have become delinquents.

"I will appreciate your opinion on these questions at your earliest convenience. Thank you so much."

It should be added to your request for an official opinion that the accrued costs referred to in your inquiry consist of the fee of the clerk for issuing a warrant of arrest, the fee of the sheriff for executing the warrant of arrest and the fees for issuing subpoenas to witnesses as indicated by your letter of April 10, 1946.

No question can arise as to the fee for issuing a subpoena to a witness to appear at a probation hearing as described in your inquiry for the reason that the clerk is not authorized to subpoena witnesses in such cases. In an opinion of the Attorney General, rendered October 17, 1939, it was stated "I find no authority of law for summoning witnesses in probation proceeding. The court hearing a petition under this Act ordinarily could not go into the facts of the original case and try the case over again. The original case is closed so far as this proceeding is concerned, when the defendant is convicted; and the only questions which should be considered at the hearing for probation are the extenuating circumstances, the defendant's previous character, etc., to try to determine whether or not he would be likely to lapse again into crime and if society may safely trust him at large. If the court feels that this case should be further investigated he may call upon the probation officer to make such further investigation, *** "

We find no authority of law, therefore, requiring the clerk to issue subpoenas in probation cases, and, therefore, there could be no fee for issuing witness subpoenas. 17 **Quarterly Report of the Attorney General** 87.

The statute quoted in your inquiry provides that the clerk "shall be allowed a fee of one dollar for each case for his services in keeping probation docket *** "

We find no provision of law in the Probation Act, or otherwise, allowing a fee to the clerk for issuing a warrant for the arrest of a delinquent probationer. In the absence of such provision the clerk is not entitled to a fee for issuing such warrant.

It was formerly held by an opinion of this office, rendered November 5, 1940, that the sheriff was entitled to a fee for executing a warrant of arrest for a delinquent probationer. 21 **Quarterly Report of the Attorney General**,

page 140-44. In view of the fact, however, that the Act has been amended and now provides "costs and fees of officers of courts *** including arrest fees for delinquent probationers upon order of the court or probation officer, *** shall be paid in the same manner and from the same funds as if no suspension of sentence had interfered," it is my opinion that the fees of the sheriff for executing the warrant of arrest, if not imposed upon the probationer by the court, are payable from the funds of the Department of Corrections and Institutions. We suggest that this fee can be collected from the Department by presenting them with a supplemental cost bill. In short, it appears that as amended the Probation Act now allows the sheriff a fee for arresting a delinquent probationer. There are no other fees provided for in hearings of the type referred to in your inquiry.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

June 14, 1946.

Hon. Eugene (Bull) Conner,
Commissioner of Public Safety,
Birmingham, Alabama.

Code 1940, Title 36, Section 1, and Section 89, as amended (General Acts 1943, p. 159)—Trolley Cars.

The word "vehicle" as defined by statute, Title 36, Section 1, does not include vehicles used as a substitute for street cars of which the movement and operation are restricted and controlled by an overhead trolley, although such vehicles or trolley cars are not operated on stationary rails or tracks. Such vehicles are not, therefore, subject to the restrictions and limitations imposed by Code 1940, Title 36, Section 89, as amended (General Acts 1943, p. 159).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of June 13, 1946, is as follows:

"The Birmingham Electric Company has embarked upon a program of modernizing its transportation system in Birmingham. As a part of this program the company proposes to employ in its transportation system a number of trolley coaches. These trolley coaches are substitutes for and similar to street cars except that they run on rubber-tired wheels and do not run on fixed tracks embedded in the streets. They are operated by overhead trolleys similar to street cars, and while they do have some freedom of movement that street cars do not have, at the same

time they cannot leave the course of the trolley wires from which electric current is obtained to operate them. It is my understanding that the trolley coach has certain advantageous application in some instances over street cars and will be used by the company as substitutes to a large extent therefor in its transportation system.

"I am advised that Title 36, Section 89 of the Alabama Code of 1940 contains regulations as to the size and width of certain vehicles operated on the highways of the State. I am informed that the only trolley coaches which are available to the Birmingham Electric Company at any time in the near future exceed in length and width the length and width set forth in the statute above cited. I write to ask you for an opinion as to whether or not these trolley coaches are in fact subject to the provisions of Title 36, Section 89 of the Code, or whether, as substitutes for street cars, they are excluded from the limitations set forth in that section.

"The program of the company is important to the City, and the use of the proposed trolley coaches is very much to be desired if their use does not violate the law. I will therefore appreciate an opinion from you at your earliest convenience."

I am of opinion that vehicles of the description and to be used for the purposes therein described are probably not within the definition of the word "vehicle" as used in Code 1940, Title 36, Section 1, and that it was not intended when this statute was originally passed by the Legislature that said definition would include such vehicles as you describe and refer to in your letter.

It would therefore seem that such vehicles are not subject to the restrictions imposed by Code 1940, Title 36, Section 89, as amended by an Act of the Legislature, approved June 17, 1943 (General Acts 1943, p. 159).

Manifestly, the Legislature did not intend to apply the restrictions or limitations contained in the section, as amended, to vehicles of limited movement such as ordinarily operate exclusively over "stationary rails or tracks."

As you point out, although in the present instance there may be no stationary rails or tracks upon which the vehicles will move, yet to all practical intents and purposes the result of operation is the same, inasmuch as in both cases the movement of the vehicles are highly restricted by a trolley whether underground or overground.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

June 19, 1946.

Mr. R. L. Hungerford,
Chief Examiner of Public Accounts,
Department of Finance,
Montgomery 4, Alabama.

~~Sheriffs—Prisons—Prisoners—~~

Title 11, Section 102, Code of Alabama 1940, prohibits payment by State of feed bill when prisoners escape.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated June 14, 1946, is as follows:

"In checking feed bills of a sheriff, it becomes necessary that we request an official opinion.

"Statement of Facts

"A prisoner was properly placed in jail on a state charge on the first day of the month. He remained there until the 11th, on which day he escaped. He was at large until April 28, upon which date he was recaptured and replaced in jail.

"Is the state liable for the feeding of said prisoner for the first period during the month that he was in jail?

"I am aware of the statute to the effect that the sheriff is not entitled to reimbursement for food served or service allowance for the month in which a prisoner escaped, but it is thought that this prohibition contemplates that the prisoner remained an escape for the balance of the month. I cannot find any opinion or decision touching upon the facts mentioned above."

It is my opinion that the sheriff cannot claim from the state an allowance for feeding the prisoner for the first period during the month that he was in jail.

The last paragraph of Title 11, Section 102, Code of Alabama, 1940, provides as follows:

"No sheriff must be paid out of the state treasury any fee or allowance whatever on account of any prisoner who has escaped from his custody; but the commissioners' court may, in their discretion, pay such fees and allowances as are payable by the county, notwithstanding the escape of the prisoner, if satisfied that such escape was not caused by the connivance or negligence of the officer having charge of him."

You will note that this section makes no exception in the case of payment by the state. Therefore, as soon as the prisoner in his custody escapes the sheriff's right to claim his allowance for feeding ceases.

The same inquiry that you have addressed to this office was answered March 9, 1936. (II Quarterly Report of the Attorney General, page 291). In that case a prisoner, while confined in the county jail pending appeal to the Supreme Court, escaped. In holding that the sheriff was not entitled to be paid a feeding allowance by the state the then Attorney General stated, "It is my opinion that the said bill you refer to can never be paid by the state." See also **Biennial Report of Attorney General, 1936-38, page 138.**

You are advised therefore that the state of Alabama is prohibited from paying the bill described in your inquiry by reason of Title 11, Section 102, Code of Alabama 1940, and the interpretation placed thereon by our former opinions. See IV Quarterly Report of Attorney General, 163; II Quarterly Report of Attorney General, 291; Biennial Report of Attorney General 1926-28, page 99.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

Overruled in part. Opinion to Frank Haynes. McQueen Log. 2-16, 1948

Hon. Charles W. Terry,

Director, Personnel Department,

Capitol.

Code 1940, Tit. 55, § 317—Primary Elections—Personnel Department—Classified Service—

Where an employee in the State classified service has been nominated or defeated for nomination in a primary election for public office, such person is not to be denied re-employment in the classified service, provided he abstains from political activity during the term of his employment.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion dated June 10, 1946, is as follows:

"The State Personnel Board has ordered that I request your **official opinion** on the provisions of Article 317, Chapter 9, Title 55 of the Code of Alabama, relative to that part of the Article which provides as follows:

" No employee in the classified service shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office "

"I shall appreciate your answer to the following specific questions:

"1. May an employee in the State classified service be a candidate for **nomination** or **election** to a public office and retain his office or position in the State classified service?

"2. If so, under what conditions does candidacy for 'nomination or election to any public office' by a State employee in the classified service constitute a violation of this law, thereby causing a forfeiture of his office or position?"

Your two questions have already, in effect, been answered in my opinion rendered May 16, wherein you were advised as follows:

"1. That a person who has been nominated for a political office may be employed during the interim between the date of the primary and general election whether he is opposed or unopposed.

"2. He may also be employed between the date of the general election and the time of his induction into office.

"All this is true on the condition that such person does no more than suffer his name to be placed on the ballot. He must do nothing to foster his election."

As pointed out in my opinion of May 16, the obvious intent of Code 1940, Tit. 55, § 317, is to prohibit a person in the classified service from engaging in political activities and at the same time undertaking to discharge the duties of the office or employment which he holds under the classified service. That part of one of the sentences which you have quoted from the statute for construction must be construed in the light of the entire sentence and the entire statute of which it is only a part. To construe the statute, or section, as a denial of the right of an officer or employee in the classified service to seek elective office would in my opinion amount to an arbitrary and capricious discrimination against such persons.

The objects and purposes of the statute are fully attained, in my opinion, if it is construed simply as forbidding a person from simultaneously waging a campaign for office and undertaking to fill an office or employment in the classified service.

In other words, that part of the statute forbidding an employee from being a candidate for "election to any public office" is subject to the qualification, to be implied or gathered from the rest of the sentence and the rest of the statute, that where an employee has been duly nominated, or defeated, in the primary, and thereafter seeks employment or re-employment in the classified service he is not to be denied such employment merely because of

the fact that he has been nominated, or because of the fact that previously he was a candidate for nomination. So long as, in either event, he abstains from further political activities during the terms of his employment, the purposes of the statute would seem to be served and satisfied, to-wit, that the employee's discharge of his duty as such employee must not be hampered or impeded by political activity on his part.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

June 21, 1946.

Hon. H. M. Brittain,
Judge of Probate,
Randolph County,
Wedowee, Alabama.

INTOXICATING LIQUOR—

PETITION FOR VOTE ON SALE OF LIQUOR IN DESIGNATED COUNTIES—

1. Section 68, Title 29, of the Code of 1940, authorizes an election to determine whether or not intoxicating liquors shall be sold in a given county and confers on the probate judge of the counties a special jurisdiction.
2. Under the above section the jurisdictional facts necessary to invoke the exercise of the jurisdiction are stated in detail.
3. This section provides that the exercise of this special jurisdiction is put in motion or invoked by a petition and such petition must allege the existence of every prescribed jurisdictional fact and if it fails to do so it is the duty of the probate judge, without further investigation on his part, by proper order to deny the petition.
4. If the petition fails to allege the existence of all of the jurisdictional facts the judge is without authority to allow an amendment of the petition or to hear evidence to supply any omitted allegations of jurisdictional facts.
5. The statute contemplates that the petition shall be signed by the petitioners with their own hands and not signed by another at his request.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, dated June 14, 1946, is as follows:

"There has been presented to me a petition requesting a referendum as to whether or not alcoholic beverages can be sold in Randolph County, a county that is now dry. The petition is in every respect legal other than the admitted fact that certain of the names shown on the petition were signed by others than those whose name appear. I am presuming that the person who had the petition was authorized to sign certain names and that he did so. This fact is also admitted by the person who delivered the petition to me and it is also apparent on the face of the petition that many names were signed by someone other than the person whose name appears. I have no written proof of any kind that the person who signed for others had any authority for his action.

"Is it my duty to accept the petition under the above conditions or should I hold up the petition and have proof made me that every signature was authorized where signed by someone other than the purported signer? Should this proof be necessary then what type proof can I demand and be within my rights?"

Your letter shows that a petition has been filed with you praying for an election by the electorate of Randolph County to order a vote as to whether or not prohibited liquors shall be sold in Randolph County. It further appears from your letter that admittedly certain names on the petition were signed by others rather than by the parties whose names are signed to the petition. You also state that it is apparent on the face of the petition that many names were signed by someone other than persons whose names appear on the petition.

On this situation you propound two questions as follows:

1. "Is it my duty to accept the petition under the above conditions or should I hold up the petition and have proof made me that every signature was authorized where signed by someone other than the purported signer?"
2. "Should this proof be necessary then what type proof can I demand and be within my rights?"

The petition under review was filed under Section 68, Title 29, of the Code of 1940, the pertinent part of which reads: "Upon the petition of 25% of the number of voters voting in the last preceding general election, being filed with the probate judge of said county said probate judge must call an election for said county to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold or distributed in said county."

This statute confers on the probate judges of the counties a special jurisdiction and under the settled principle of law of this State such jurisdiction cannot be invoked or exercised by the judge of probate until it is made to appear to him that all of the essential and jurisdictional requirements of the statute actually exist. An examination of the quoted provisions of the statute clearly discloses what these jurisdictional facts are. First, a petition, addressed to the judge, must be filed, second, this petition must be signed by a sufficient number of qualified electors of the county to constitute 25% of the number of voters voting in the last preceding general election held in the county. It is manifest that these named jurisdictional facts must exist and be made to appear to the probate judge before he can act.

How is this to be done?

The statute answers the question and says that it shall be done by a petition. It logically follows that everyone of the named jurisdictional facts must actually be alleged in the petition, that is, the petition must allege as a fact that the names of the signers of the petition are qualified voters of Randolph County; that the signers of the petition constitute at least 25% of the votes that were cast in the last preceding general election in that county. The petition must show all these allegations on its face and the judge must find these facts from the face of the petition, and he has no authority to supply any missing facts, nor has he any authority to presume that they exist. Nor has he authority to have a hearing for the purpose of receiving evidence to show that anyone of these jurisdictional facts actually existed, although not alleged in the petition. When the petition is filed with him its validity is at once fixed and it must stand or fall on the allegations contained in it; there can be no amendment of it. If the petition does not contain an allegation of the existence of all the above jurisdictional requirements we have pointed out, the judge must then enter an appropriate order denying the petition.

If the petition contains statements or allegations showing the existence of all the jurisdictional facts as set out above, yet if it shows on its face that some one or any of these allegations are false it is the duty of the judge to deny the petition.

Your letter shows an apt case for the application of these principles. You say that the person filing the petition admitted that names signed to the petition were not signed by the petitioners, and further that it is apparent on the face of the petition itself that names on the petition were signed by someone other than the persons whose names appear thereon.

It is your duty under the law on your own motion to exclude these names and after doing so if the remaining names reduce the number below 25% of the number of voters who voted in the last preceding general election in the county you should without further proceeding deny the petition.

The statute clearly contemplates that the petition shall be in writing and that it shall be signed by the petitioners. To sign a written instrument means that the person does so with his own hand. True, he may sign by his mark or he may sign by a stamp or symbol which is adopted by him as his name, but in all events, it must be done by him and not by another.

If the petition shows, as you state in your letter, that names of the petitioners were signed by some other person you are without authority to hear evidence to show that the party actually signing a petitioner's name was authorized to sign it for him. To allow this would do violence to the principles that the petition must stand or fall on its own showing.

Our conclusions are fully supported by a decision of the Supreme Court of this State in the case of **Town of Flatcreek v. Alabama By-Products Corporation**, 245 Ala. 528.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

June 22, 1946.

Hon. H. G. Dowling,
Commissioner of Revenue,
Department of Revenue,
Montgomery 2, Alabama.

Code 1940, Title 51, Sections 6, et seq.—

Exemptions from State Taxation—Department of Revenue.

1. The Department of Revenue is without authority to grant any exemption from State taxation under Code 1940, Title 51, Sections 6, et seq., that would impair the lien for State taxes attaching to property at the beginning of the tax year on October 1 prior to application for exemption.

2. The Department of Revenue is without authority to grant exemptions from State taxation upon application therefor after the plant or any addition thereto or exemption thereof has been completed and put into operation.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of February 26, 1946, is as follows:

"Some days ago you rendered an official opinion (dated January 9, 1946) with reference to the exemption of industries from State ad valorem taxation as allowed in Section 6, Title 51, Code of Alabama 1940. I need further advice on this same point. Will you please give me the answer to the following questions:

"1. Where an Alabama company existing prior to September 13, 1939 constructed an addition or extension in the tax year 1942 and failed at that time to request any exemption for such addition or extension, would the company have the right several years later to submit application?

"2. If such company filed a petition for exemption in 1946, for what years would the exemption, if granted, apply?"

Statutes of doubtful meaning must be construed as to avoid objection on constitutional grounds. For that reason the statute in question (Code 1940, Title 51, Sections 6, et seq.) cannot be construed as authorizing the Department of Revenue to release, discharge, or impair any lien for State taxation that has attached to property prior to application to the Department for exemption thereof. Such construction would conflict with Section 100 of the Constitution of 1901, and would render the statute null and void. *Union Bank & Trust Co. v. Phelps*, 228 Ala. 236, 153 So. 644; *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 So. 527.

In the latter case, on page 16, paragraphs 16 and 17, it was held with reference to liability for taxes that "Section 100 applies whether the liability is due or not, if it is fixed. There is a personal liability for ad valorem taxes on property by its owner on October 1 for the succeeding year, though the amount is not then ascertained, and **the legislature is powerless to relieve him of it by any act effective after that date.**" (Emphasis supplied)

In that case, on page 17, it was said: "But we think it is clear that the right of such exemption is one which the taxpayer who owns the property must claim with each annual assessment of his property."

I am of opinion, therefore, that where an Alabama company existing prior to September 13, 1939, constructed an addition or extension in the tax year 1942, and failed at that time to request any exemption for such addition or extension, the Department of Revenue is without power, upon subsequent application for exemptions by the company, to grant such application. The answer to your first question is, therefore, No.

In opinion to the Tax Collector of Jackson County, July 28, 1941, (Quarterly Report, Attorney General, Volume 24, page 93) it was ruled that a plant or factory is not entitled to exemption from county ad valorem taxes as to any property in existence prior to the date of applying for such exemption, and that where taxes had become a lien on property on October 1 prior to application for exemption, the county governing body was not authorized to remit, release, postpone or reduce liability or obligation for taxes for such tax year. The same principle applies, I think, with reference to exemptions from taxation authorized to be granted under Section 6 of Title 51 of the Code by the Department of Revenue.

With reference to such exemptions, it has been said that the exemption statute operates "as an inducement to the location of manufacturing plants in the State . . . It is **prospective** in character." **State v. Alabama Educational Foundation**, *supra*, page 17. The same conclusion is to be drawn from the statute itself which purports at the very outset to be for the purpose "of encouraging the construction, extension and operation of factories and plants" for numerous enumerated purposes. Should the statute be construed as permitting exemption of property after the plant, or addition or extension, has been completed and put in operation, without prior application for such exemption, it would operate as a reward rather than an inducement, and in such aspect would come in conflict possibly with Section 93 of the Constitution, as amended, forbidding, among other things, the State from lending money or its credit to any individual, association, or corporation.

This substantial doubt as to the validity of the statute, if under it the Department of Revenue may grant exemptions from taxation after a plant has been constructed, or after an existing plant has been extended or enlarged, lends weight to the view that the Department is without authority to grant exemptions after a plant has been enlarged or extended.

In conclusion, therefore, I must adhere to the opinion rendered July 28, 1941, to the Tax Collector, Jackson County, and am of opinion that the same principle applies to exemptions from State taxation by the Department of Revenue under Title 51, Sections 6, et seq., *supra*.

In *Jones v. Johnson, Tax Assessor*, 240 Ala. 357, it was held with reference to homestead exemptions that the exemption must be claimed not later than the third Monday in January each year, and that otherwise the exemption was lost. In that case, the court observed that the exemption statute itself provided no administrative procedure for claiming the exemption, and, therefore, the administrative construction previously adopted would prevail. It is also elemental that grants of exemptions must be strictly construed in favor of the taxing power, and that in order to obtain the exemption, there must be a strict compliance with the exemption statute. *State v. Bridges*, 246 Ala. 486, 489 (Par. 3). For these reasons, I am of opinion that in the absence of express specific authority on the part of the Department to allow exemptions after a plant has been completed, or after an addition or exemption has been completed, such power cannot be implied from anything appearing in the statute itself.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

June 22, 1946.

Mr. Edward Anderson,
Supt. Madison County Schools,
Huntsville, Alabama.

1. Grounds for cancellation of employment contracts of teachers on continuing service set forth by Title 52, Section 356, on year-round basis.

2. Method of cancellation of employment contracts of teachers on continuing service set forth by Title 52, Section 357, on year-round basis.

3. Cancellation of employment contracts of teachers not on continuing service is based on the original terms of their contract.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of June 12, 1946, is as follows:

"The County Board of Education of Madison County has asked that I write you for an opinion relative to Tit. 52 P 357 and Tit. 52, P. 360.

"A teacher is notified in writing under the provisions of 360 that she will not be employed for the next year. The Board wants to know if the provisions of P. 357 'Not less than thirty, nor more than forty days

before the consideration by the employing board of education, of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when, and place where such consideration is to take place; and such teacher shall be furnished with a written statement of the reasons for such consideration within five days after any written request for such statement *** '

"Our Board understands P. 357 to apply to cancellation of contract during the school term and P. 360 to apply to dismissal of teacher at end of school year. Please give us your opinion."

It is my opinion that the Board's conclusion that Section 357 applies to "cancellation of contract during the school term and Section 360 to apply to dismissal at the end of school year," is incorrect.

Section 360 you refer to is as follows:

"Any teacher in the public schools, whether in continuing service status or not, shall be deemed re-employed for the succeeding school year at the same salary, unless the employing board of education shall cause notice in writing to be given said teacher on or before the last day of the term of the school in which the teacher is employed; provided, however, that in no case shall such notice be given the teacher later than the first day of May of the termination of such employment, and such teacher shall be presumed to have accepted such employment unless he or she shall notify the employing board of education in writing to the contrary on or before the first day of June."

It is my opinion that the intent and purposes of Section 360 is to obviate the necessity of new contracts each year with individual teachers by making re-employment for another year automatic unless notified to the contrary. The wording of this Code section does not indicate that the Legislature had foremost in mind the setting up of machinery for the "dismissal of teachers at the end of the school year" as you refer to in your letter, although compliance with said Code section at the end of the year might necessarily be an incidental step in dismissal proceedings at such time. The section appears primarily directed toward re-employment and not dismissal.

Dismissal or cancellation of employment contracts of teachers on continuing service specifically had the attention of the Legislature as indicated by Section 356, which sets forth grounds of cancellation, and Section 357 which sets forth the method of cancellation. Included in the latter Code section is the right of a teacher on continuing service to have a hearing according to prescribed proceedings. It is noted that there is nothing in these statutes referring to "during the school year" or "at the end of the school year," and it is my opinion that the provisions of Section 356 and Section 357 are applicable to teachers on continuing service regardless of the time of year dismissal proceedings are instituted. To hold otherwise would, in effect, nullify a part of the protection afforded teachers on continuing service status during seasonal periods of the year. This obviously was not the legislative intent.

No provisions in this chapter of the Code are noted for cancellation of contracts of teachers not on continuing service, although automatic renewal

for the following year, unless due contrary notice is given, is provided teachers of such status by Section 360. Inasmuch as Sections 356 and 357 relate only to teachers on continuing service, it would appear that cancellation of contracts of teachers not on continuing service would revert strictly to the cancellation terms of their original contracts of employment, and no rights under Sections 356 and 357 would ensue.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

June 24, 1946.

Hon. W. T. McKee,

Assistant Superintendent, and Co-Custodian of School Funds,
Montgomery Public Schools,
Montgomery 5, Alabama.

Contracts—County Board of Education

A contract between a county board of education and a firm or partnership, composed in part of one of the members of the board, for construction of school buildings, is against public policy, illegal, and unenforceable, although bids are invited by publication, only sealed bids are received, and the bids are opened publicly at a stated time.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of March 29, 1946, is as follows:

"Would a member of the local Board of Education whose firm is a partnership be eligible to bid and construct school buildings for our Board of Education under the following conditions:

1. Bids are advertised in the county paper;
2. Only sealed bids are received;
3. Bids are to be opened publicly at a stated time."

It is a well-settled principle of law that a contract between a public board and one of its members, or in which one of its members is financially interested, for services or construction, is against public policy, illegal and void. *McGehee v. Lindsay*, 6 Ala. 16 (1844); 17 C. J. S. 580, § 215; 13 C. J. 434, § 371, n. 88; 11 Century Dig. 585, § 605—Contracts.

The rule has been stated in the American Law Institute's Restatement of the Law—Contracts, § 566—thus:

"Even though the duties of one who is employed by a public board are not such as his duty as a member of the board would require him to perform, the bargain is illegal, since it introduces an influence that is different from that which a member of the board would have as such, and that might tend to a violation of duty."

As an illustration of the rule, it is said:

"A, a physician and member of a board of health, is employed by the board at the usual medical rates to care for a smallpox patient who is in charge of the board. A refrains from voting for the appointment but accepts it. The bargain is illegal."

In *Meehee v. Lindsay*, supra, it was held that where one of several commissioners appointed by the State to contract for certain public work became interested in a contract between the commissioners and another to perform the work, the agreement for such interest was against public policy, a fraud on the state, and could not be enforced.

The doctrine of that case has never been repudiated or disclaimed, whatever distinctions may have been sought to be drawn in its application. *Mayor, etc. v. Hollingsworth*, 170 Ala. 396 (1910).

And the doctrine or principle involved is, in my opinion, sufficient to condemn as against public policy, and therefore unenforceable, any contract by a county board of education in which one of its members is financially interested by reason of the fact that the other party to the contract is a firm or partnership composed in part of such member of the board.

The result is that, in my opinion, your question must be answered in the negative, and that neither the member nor his firm is "eligible to bid and construct school buildings," under the conditions stated.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

June 26, 1946.

Hon. L. C. Walker,
Judge of Probate,
Shelby County,
Columbiana, Alabama.

Code 1940, Title 51, Sections 450, 575—

Licenses—Pool Tables—General Acts 1945, page 589—Veterans' Exemptions—

1. Veterans entitled to exemptions under Act No. 366, H. 606, approved July 9, 1945 (General Acts 1945, page 589) are entitled to such exemptions as against the license tax imposed by Code 1940, Title 51, Sections 450, 575, for the operation of pool tables.

2. Opinion of Attorney General, Biennial Report, 1930-1932, page 577, overruled.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, dated June 19, 1946, is as follows:

"Please advise me if, under Section 852 of Title 51, as amended by 1943 Acts on page 562, and as amended by Act approved July 9, 1945, 1945 General Acts, on page 589, and page 590, a veteran would be entitled to exemption from license for the operation of a pool table, or pool tables."

The operation of one or more pool tables of the kind described in Code 1940, Title 51, Section 575, requires the personal attention of one or more persons. Such operation is a business or occupation within the purview of Section 450 of Title 51, and persons engaging therein are required by said Section 450 to pay a license tax measured by the number and kind of tables operated as provided in said Section 575. The tables cannot operate themselves.

It is my opinion that persons entitled to exemptions under Act No. 366, H. 606, approved July 9, 1945 (General Acts 1945, page 589) are therefore entitled to such exemptions as against the tax imposed by said Section 575.

Accordingly the opinion of this office rendered November 21, 1931, to the Judge of Probate, Walker County (Biennial Report, Attorney General, 1930-32, page 577) is hereby overruled and withdrawn.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

June 26, 1946.

Hon. J. S. Freeman,
Chairman Board of Revenue,
Walker County,
Jasper, Alabama.

Prisoners—Title 45, Sections 125, 129, 130, Code of Alabama 1940—
Hospitalization—Sheriffs—Guard fees—

County authorized to pay medical expenses and hospitalization
expense for prisoners under certain conditions.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, dated June 8, 1946, is as follows:

"Some days ago Robert Lee Perry was shot by an officer undertaking to arrest him while he was committing a burglary in this county. The officer took him to the Peoples Hospital at Jasper, which now has a bill for hospital services. Section 129 of Title 45 of the Code makes provision for prisoners to be placed in a hospital only upon an order of the Judge of the Circuit Court or of the County Court and in case such order is made Section 130 authorizes the sheriff to employ guards. Neither of these sections says who shall pay the hospital bill or the expense incurred for medical attention or guard fees.

"The case against Robert Lee Perry being a felony, we have an idea that whatever expense in the way of hospital bill and guard fees was incurred should be paid by the state. Will appreciate your opinion on the following questions:

"1. In the case of a felony should the expense of hospital care and medical attention be paid by the state or should it be paid by the county?

"2. Should such payment be made by either the state or county where no order had been made by the Circuit Judge or Judge of the County Court directing the sheriff to put the prisoners in a hospital?

"3. Who should pay the expense of employing guards? Should it be paid by the state or should it be paid by the county in the circumstances covered by the foregoing statement and by questions numbered one and two?

"4. Section 125 of Title 45 requires the sheriff to, at the expense of the county, furnish medical attention to prisoners unable to provide it for themselves. Would this include hospital services regardless of whether the judge has ordered the prisoners sent to the hospital?"

Answering your specific questions, you are advised that,

1. It is immaterial whether the person in jail is charged with a felony or a misdemeanor insofar as the payment of hospital care and medical attention is concerned. If it is payable it is payable by the county. The opinions of this office have heretofore recognized that the county is liable for the payment of hospital and medical expenses regardless of the charge if other conditions are complied with. See Biennial Report for 1936-38, page 553, where the person was charged with murder.

2. Payment should not be made where there has been no order made by the circuit judge directing the sheriff to put the prisoner in the hospital. Title 45, Section 129, Code of Alabama 1940, provides as follows:

"§ 129. Removal of prisoners in ill health.—When the life or health of any prisoner, who is not confined under process from any court of the United States, may be seriously endangered by longer confinement in jail, and that fact is made to appear clearly to any circuit judge, or to the judge of the county court of the county, such judge must, by an order in writing direct the sheriff or jailer to remove him to some suitable place, or hospital, as near as may be to the jail, and there safely keep him until his health is sufficiently restored to authorize his recommitment to jail."

The above section clearly states that certain facts must be made to appear clearly to the circuit judge or to the judge of the county court and that an order must be made in writing by this judge before the prisoner can be removed to a hospital, unless these facts are judicially determined and the removal is carried out according to statute, there is no liability on the part of the county to pay the hospital bill. *Malone v. Escambia County*, 116 Ala. 214, 22 So. 503.

3. The county is authorized to pay the expenses of employing guards at the hospital under the provisions of Title 45, Section 130, Code of Alabama 1940, which provides as follows:

"§ 130. Guards summoned in case of removal.—When prisoners are removed from the jail under the provisions of either of the two preceding sections, the sheriff or jailer has authority, and it is his duty, to summon such guards as may be necessary to insure their safekeeping."

It should be pointed out, however, that there is no provision for paying guards unless the prisoner is removed under the order of the circuit judge or judge of the county court under the provisions of Title 45, Section 129, Code of Alabama 1940. Biennial Report of the Attorney General 1936-38, page 553-555.

4. In answer to your question numbered four, you are advised that Title 45, Section 125 of the Code of Alabama 1940, in providing

"§ 125. Necessary clothing, medicines, medical attention, etc., to insolvent prisoners.—Necessary clothing and bedding must be furnished by the sheriff or jailer, at the expense of the county, to those prisoners who are unable to provide them for themselves; and also necessary medicines and medical attention to those who are sick or injured when they are unable to provide them for themselves."

does not include hospitalization service. This for the reason that in order to place a prisoner in the hospital there must be a finding and order of the circuit judge in compliance with Title 45, Section 129, Code of Alabama 1940. When there has been a compliance with Section 129, *supra*, the expenses of hospitalization may be paid under Title 45, Section 125 when the prisoner is insolvent or unable to provide payment himself. 21 Quarterly Report of Attorney General, page 110.

It may be stated in conclusion that our statutes provide for the medical attention and hospitalization of persons who are confined to jail. It matters not whether the prisoner is charged with a felony or a misdemeanor, the expenses are paid by the county. There are certain requirements, however, to be fulfilled before the county may pay such expenses. In the case of mere medical attention, where there is no hospitalization, such medical attention may be paid for by the court of county commissioners if the prisoner is insolvent or unable to pay himself. The court of county commissioners may also pay the hospital expense if the prisoner is unable to pay himself, but only when the prisoner has been committed to the hospital on order of a judge.

It should further be added that the expense of employing guards may be paid for by the county when the prisoner is properly committed to the hospital by order of the circuit judge or judge of the county court.

Yours very truly,

WILLIAM N. McQUEEN,
Attorney General.

June 28, 1946

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

ELECTIONS

ABSENTEE VOTERS IN PRIMARY AND GENERAL ELECTIONS—

1. Under Acts of 1945, page 711 all qualified electors may vote an absentee vote by complying with the conditions prescribed in the Act in any primary election held to nominate candidates for the regular general elections prescribed by law or in any primary election called for the nominating of a candidate or candidates to fill vacancies in the list of nominated candidates.

2. Under this same Act of the Legislature all qualified electors may vote an absentee vote in any regular general election held under the general election laws of this State by complying with the conditions prescribed in the Act of 1945 for voting absentee votes and such

qualified electors may vote an absentee vote at any election called and held for the purpose of filling any vacancies occurring in any county or state office including Congressmen and United States Senators.

Opinion by Assistant Attorney General Callahan.

Dear Judge Hill:

We are in receipt of your letter of June 24, 1946, in which you state that Act No. 478 of the General Acts of 1945 (pages 711-717) provides for absentee voting in primary, general and municipal elections and that the Governor has called a special election for November 5, 1946, for the election of a United States Senator. On this you ask this question:

"Shall I issue absentee ballots for this special election to be held on November 5, 1946?"

Your letter further points out that the State Democratic Executive Committee has called a special primary election to be held July 30, 1946, and if necessary a second special primary election to be held on August 27, 1946, for the nomination by the Democratic Party of a United States Senator and a State Superintendent of Education, and on this statement you propound this question:

"Shall I issue absentee ballots for said special primary election?"

The obvious purpose of this Act is to authorize any and all qualified electors of the State of Alabama to vote an absentee ballot in all primary, general and municipal elections in the circumstances and under the conditions therein specifically provided. These conditions are that if by reason of his regular business and in the performance of his regular duties he will be absent from the state or from the county in which he is a qualified elector. Harkening to the title of the Act, Section 1 states:

"The provisions of this section shall apply to **all primary**, general and municipal elections hereinafter held in the State of Alabama."

It is a cardinal rule of statutory construction that the purpose of the act controls, and must be kept constantly in mind. It is an equally binding rule of construction that this purpose must be ascertained from the language used in the act and the intent of one or more members of the legislature cannot be considered. It must be the legislative body's intent. The law presumes that the legislature knew the meaning of the words it used and that they were used in their ordinary sense. When the language is so construed and no reasonable doubt exists, then there is nothing to construe. The language used speaks for itself. If from the language used there is a reasonable doubt as to the meaning of the statute it is proper and even necessary to look to the history of the questions with which the enactment is dealing.

Keeping in mind the foregoing premises, we will consider the questions propounded by your letter.

The Act says that it shall apply to all primary elections. The word "all" has a very broad meaning. It means the greatest possible number. It may mean every or the whole number. So applying it in this sense it means the greatest number of primary elections or any number of them. This statute says nothing about a special primary or a second primary. There was no need for such a statement because the statement "all primaries" would include any number of special primaries or first or second primaries. It still remains a primary election and all qualified electors may vote in any or all of such elections. Any qualified voter may vote an absentee vote if on the day of the primary by reason of his regular business or in the performance of his regular duties he will be absent from the state or from the county in which he is qualified to vote. It may be noted that our primary law simply provides for the nomination of a candidate by political organizations to offer for an office to be voted upon in the general election.

The Act authorizes all qualified electors to vote an absentee ballot in all general elections. That word "all" applies to general elections. We have been unable to find any decisions of our courts undertaking to definitely define what constitutes a "general election." We have examined the decisions of the courts of other states and find a general discussion of the subject and find that they are dealing with constitutions and statutes different from our constitution and our statutes, which differences may somewhat affect the opinions of the court. When it comes to giving a definition they are in general agreement that a general election means a state-wide election at which all the people entitled to vote under the law may vote on a question or questions affecting them as a whole. Some of the definitions go further by holding that it is a general election although it may be confined to certain subdivisions of the state provided it is an office in which the whole public in that subdivision has an interest. Fairly representative of these definitions we cite the following cases: *State ex rel Diederichs v. State Highway Commission* 296 Pac. 1033, 1036; *Territory v. Ricordati*, 132 Pac. 1139.

Our statutes on elections appear to be drawn in recognition of the foregoing definitions. They provide for the general election for state, county and district officers and United States Senators, and fix the date for the holding of such elections. **Code 1940**, Title 17, Sections 65-76.

Our statute, recognizing that vacancies in these offices may occur between these dates of election has provided for elections to fill the same. **Code of Alabama, 1940**, Title 17, Sections 215-221.

This cited Section 221 provides that such elections are to be held and conducted in all respects by the provisions in relation to general elections. All these various provisions are in one elaborate system of election laws created under the Constitution of the State and the statutes enacted thereunder. Our Constitution made no distinction as to the classification of elections. It was content to say that persons who possess the qualifications required shall be electors and shall be entitled to vote at any election by the people. **Constitution 1901**, Section 177. This provision conferred civil rights on all such persons and guaranteed to them the right to have a voice in the administration of their government. The universal rule of construction of constitutions and statutes of this character requires that they shall receive a liberal rule of construction so as to preserve such rights and that the rights are not to be

destroyed or embarrassed unless the language used expressly or by necessary implication requires it. Certainly they are not to be endangered or destroyed by mere terminology.

A special election to fill vacancies, here under review, has in it the essentials of the general election laws. The voter has an abiding interest in the offices of United States Senator and the State Superintendent of Education. In my opinion the term general election used in the Acts of 1945, page 711, does not mean necessarily the general election laws of this state which provide for the holding of elections at stated periods. The general election named in this 1945 enactment means a state-wide election at which all the people entitled to vote may vote upon a question affecting them as a whole. The special election to be held November 5, 1946, really means a special general election. These views are sustained by the case of *State ex rel Diederichs v. State Highway Commission*, 296 Pac. 1033, 1036.

When this Act of 1945 is construed in the light of our constitutional provisions and election laws we are not authorized to conclude that the legislature was attempting to distinguish between different kinds or classifications of elections or between regular and special elections. We must presume that the legislature had knowledge of our Constitution and statutes dealing with elections and that it had no intention of limiting or denying the right of the electors to participate in matters vitally affecting their rights.

Let us note some of the results that would follow from a different holding. Under this 1945 Act, as we have pointed out, a qualified voter may, under the conditions stated in the Act, cast an absentee ballot in a primary election, yet he could not thereafter on the date of the so-called special election vote an absentee ballot for the very person for whom he voted in the primary. Again the Act authorizes the voting of absentee ballots in the general election on November 5, 1946, but such voter is denied this right to vote an absentee ballot on that same day and place in the special election. We cannot assume that the Legislature in passing the Act of 1945, intended such an absurd result.

It follows from the foregoing that the statement or holding in the opinion of this office rendered on August 1, 1945, wherein it is stated that the Act of 1945 does not provide for absentee ballots in special elections, must be so limited as not to apply to the special elections for public officers such as here under review. The opinion herein referred to rendered on this question, dated August 1, 1945, applies to a special election where the voters are voting on a question or proposition and does not apply to those elections wherein the voters are voting for a public official.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

INDEX

Quarterly Report, Attorney General
Volume 43
April 1, 1946 Through June 30, 1946

Page

—A—

ABSENTEE BALLOTS:

Absentee voters—May vote in any election to fill vacancies in county or State offices including congressmen and U. S. senators	60
Absentee voters may vote in any primary called to nominate candidate to fill vacancy in list of nominated candidate	60

ACTS (GENERAL AND LOCAL)

GENERAL ACTS 1943:

Page 86	19
Page 221	26
Page 311	9

GENERAL ACTS 1945:

Page 304	31
Page 570	28
Page 589	57
Page 660	16
Page 666	24
Page 711	60

LOCAL ACTS 1923:

Page 319	19
----------------	----

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD:

Petition for vote on sale of liquor in counties—	
Must be signed by petitioner	48
Petition for vote on sale of liquor in counties—	
Must allege jurisdictional facts	48

APPEALS:

Recorder's Court to circuit court—Bond not approved—	
Case should not be docketed	29

INDEX

(Continued)

Page

APPROPRIATIONS:

University of Alabama—Under Act No. 418, Gen. Acts 1945, p. 660, for payment of debts	16
--	----

ATTORNEYS:

Appointed in capital cases—Fee—Entitled to even if no trial had	26
---	----

—C—

CIRCUIT COURTS:

Appeal from Recorder's court—Bond not approved— Case should not be docketed	29
--	----

CLERKS OF CIRCUIT COURTS:

Probation—Hearing for revocation of—No authority to summon witnesses	40
Recorder's court—Appeal to circuit court—Bond not approved— Case should not be docketed	29

CODE OF ALABAMA 1940:

TITLE 1:

Section 12	14
Section 14	23

TITLE 11:

Section 7	34
Section 34	21
Section 102	45

TITLE 13:

Sections 471-474	34
------------------------	----

TITLE 15:

Section 318, as amended	26
-------------------------------	----

TITLE 17:

Section 349	7
-------------------	---

INDEX

(Continued)

	Page
TITLE 29:	
Section 68	48
Section 102	24
Sections 257 and 258	24
TITLE 36:	
Section 1	43
Section 9, as amended	43
TITLE 37:	
Section 587	29
TITLE 42:	
Sections 19-26	24
TITLE 45:	
Section 125	58
Sections 129, 130	58
TITLE 51:	
Section 6	51
Section 450	57
Section 575	57
Section 647, as amended	36
Section 835(c)	28
Section 850	30
TITLE 52:	
Sections 356, 357, 360	53
TITLE 55:	
Sections 301, 303, 304	5
Section 316(3), as amended	10
Section 317	46
CONSTITUTION 1901:	
Section 43	14
Section 61	14

INDEX

(Continued)

Page

CORRECTIONS & INSTITUTIONS, DEPARTMENT OF:

Prisoner escaped from county jail—State may not pay feed bill	45
Probation—Payment of court costs	24
Sheriffs—Informers fees—Probation—Payable by	24

COSTS AND FEES:

Attorney appointed in capital case—Entitled to even if no trial had	26
Clerks—Warrant of arrest for probation violator—No fee for issuing	40
Escape prisoner—State may not pay feed bill	45
Justice of peace and courts of like jurisdiction—Real estate may not be sold for collection of costs taxed against plaintiff under Title 11, Section 7	34
Prisoners—Medical and hospital expenses—Authority of county to pay	58
Probation—court costs—Payable by Department of Corrections and Institutions	24
Sheriff—Summoning jury in sanity inquisition	21
Sheriff—Summoning special jury in sanity hearing	21
Sheriff—Informers fee—Probation—Payable by Department of Corrections & Institutions	24
Sheriff—Prisoner in hospital—Payment of guard fee	58
Suit by next friend of minor—Liability for costs	33

COUNTIES:

Farm to market roads—Cost of hauling material by county— Credit in determining total costs	9
Prisoners—Medical and hospital expenses—Authority to pay	58

COUNTY BOARDS OF EDUCATION:

Contract between board and firm, composed in part of one of members of board, illegal	55
--	----

COURTS OF COUNTY COMMISSIONERS:

Fee of attorney appointed to defend capital case	26
Prisoners—Medical and hospital expenses—Authority of county to pay	58

—D—

DEPARTMENT OF REVENUE:

Taxation—Exemptions—Plants and factories—No authority to grant after plant or addition completed and in operation	51
Taxation—Exemptions—Plants and factories—No authority to impair lien for taxes attaching prior to application for exemption	51

INDEX

(Continued)

Page

—E—

ELECTIONS:

Absentee voters—May vote in any election to fill vacancies in county or state offices including congressmen and U. S. senator	60
Absentee voters—May vote in any primary called to nominate candidate to fill vacancy in list of nominated candidates	60
Person in state classified service nominated or defeated in primary—Re-employment of	46
Primary—Officials—List furnished by Executive Committee deficient—Appointing board supplies deficiency	7
Primary—Officials—appointing board—List furnished to—Must be used unless deficient	7

EXEMPTIONS:

Licenses—Veterans—Cannot be applied in payment of penalty for delinquency	28
Taxation—Department of Revenue—Plants and factories—No authority to impair lien for taxes attaching prior to application for exemptions	51
Taxation—Department of Revenue—Plants and factories—No authority to grant after plant or addition completed and in operation	51
Veterans—Pool table license	57

—G—

GASOLINE AND GASOLINE TAX:

Winston County—Funding road and bridge and registered claim bond—Cannot be used to pay interest and principal of	36
--	----

GOVERNOR:

Daylight saving time—Not authorized to proclaim	14
---	----

—H—

HIGHWAYS AND HIGHWAY DEPARTMENT:

Farm to market roads—Cost of hauling materials borne by county—credit for	9
Trolley coaches not subject to restrictions imposed by Title 36, Section 89, as amended	43

INDEX

(Continued)

Page

—I—

INFANTS:

Suit by next friend of minor—Liability for costs	33
--	----

INFERIOR COURTS:

Municipal Court of Birmingham—Real estate may not be sold for collection of costs taxed against plaintiff under Title 11, Section 7	34
---	----

INSANE PERSONS:

Sheriff—Fee—Summoning jury in sanity inquisition	21
Sheriff—Fee—Summoning special jury in sanity hearing	21

INTOXICATING LIQUORS:

Petition for vote on sale of liquor in counties— Must allege jurisdictional facts	48
Petition for vote on sale of liquor in counties— Must be signed by petitioner	48

—L—

LICENSES:

Pool tables—Veterans' exemptions	57
Rated on population of municipality—Determining on last preceding U. S. census	23
Veterans—Exemptions—Cannot be applied in payment of penalty for delinquency	28

—M—

MERIT SYSTEM:

Person in state classified service nominated or defeated primary— Re-employment of	46
State employee—Returning veteran—Reinstatement— Written request for not mandatory	10
State employee—Returning veteran—Reinstatement— Position and location	10
State employee—Returning veteran—Reinstatement— Application for within 12 months from discharge	10

INDEX

(Continued)

	Page
State employee—Returning veteran—Reinstatement— Approval of Personnel Board must be obtained	10
State employee—Returning veteran—Reinstatement— Mental and physical examination not necessary	10
Unclassified service—Employee designated by appointing authority— Duties and pay controlled by	5
 MILITARY AND NAVAL AFFAIRS:	
State Board of Veterans Affairs—Appointment of members	31
 MOTOR VEHICLES:	
Trolley coaches not subject to restrictions imposed by Title 36, Section 89, as amended	43
—O—	
 OFFICERS & OFFICES:	
State Board of Veterans Affairs—Appointment of members	31
 OPINIONS OVERRULED, MODIFIED & DISTINGUISHED:	
Biennial Report 1930-1932, p. 577	57
—P—	
 PARDON, PAROLE & PROBATION:	
Hearing for revocation of probation—Clerk not authorized to summon witnesses	40
Probation violator—Sheriff entitled to fee for arresting	40
Probation violator—Warrant of arrest—Clerk not entitled to fee for issuing	40
 PRISONS & PRISONERS:	
Escape prisoner—State may not pay feed bill	45
Medical and hospital expenses of prisoner—Authority of county to pay	58
—R—	
 RECORDERS COURT:	
Appeal to circuit court—Bond not approved—Case should not be docketed	29

INDEX

(Continued)

Page

—S—

SCHOOLS:

Contract between County Board and firm, composed in part of one of members of board, illegal	55
Teachers on continuing service—Cancellation of contract	53
Teachers not on continuing service—Cancellation of contract	53
University of Alabama—Appropriation under Act No. 418, Gen. Acts 1945, p. 600, for payment of debts	16

SHERIFFS:

Chief deputy—Walker County—Local Act 1923, p. 319, fixing compensation repealed by Gen. Acts 1943, p. 86	19
Escape prisoner—State may not pay feed bill	45
Fees—Summoning jury in sanity inquisition	21
Fees—Summoning special jury in sanity hearing	21
Informers' fees—Probation—Payable by Department of Corrections & Institutions	24
Prisoner in hospital—Payment of guard fee	58
Probation violator—Entitled to fee for arrest of	40

STATUTES:

Local Acts 1923, p. 319, repealed by Gen. Acts 1943, p. 86	19
--	----

—T—

TAXATION:

Exemption—Department of Revenue—Plants and factories—No authority to impair lien for taxes attaching prior to application for exemption	51
Exemption—Department of Revenue—Factories and plants—No authority to grant after plant or addition completed and in operation	51

TEACHERS:

On continuing service—Cancellation of contract	53
Not on continuing service—Cancellation of contract	53

TIME:

Daylight saving—Governor not authorized to proclaim	14
---	----

INDEX

(Continued)

Page

—U—

UNIVERSITY OF ALABAMA:

Appropriation under Act No. 418, Gen. Acts 1945, p. 660, for payment of debts incurred subsequent to passage of Act	16
---	----

—V—

VETERANS:

Exemptions—Pool table license	57
Licenses—Exemptions—Cannot be applied in payment of penalty for delinquency	28
State Board of—Appointment of members	31
State employee—Reinstatement—Not mandatory to file written request with Personnel Board	10
State employee—Reinstatement—Application for within 12 month from discharge	10
State employee—Reinstatement—Position and location	10
State employee—Reinstatement—Personnel Board must approve	10
State employee—Reinstatement—Mental and physical examination not necessary	10

VOTERS:

Absentee—May vote in any election to fill vacancies in County or State offices including congressmen and U. S. Senator	60
Absentee—May vote in any primary called to nominate candidate to fill vacancy in list of nominated candidate	60

—W—

WALKER COUNTY:

Chief deputy sheriff—Local Act 1923, p. 319, fixing compensation repealed by Gen. Acts 1943, p. 86	19
--	----

WINSTON COUNTY:

Funding road and bridge and registered claim bond of—Gasoline excise tax—Cannot be used to pay interest or principal	36
--	----

WITNESSES:

Insane persons—Inquisition—Fee of sheriff for summoning	21
Special jury in sanity hearing—Fee of sheriff for summoning	21

